TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY, PETITIONER,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 106 PETITION FOR CERTIORARI FILED APRIL 17, 1957

CERTIORARI GRANTED JUNE 3, 1957

NO. 118 PETITION FOR CERTIORARI FILED MAY 8, 1957

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Tenth Circuit	1	1
Petition to review decision and order of the Secretary of Agriculture	1	1
Exhibit "A"—Decision and order	6	6
Motion of The Denver Union Stock Yard Company to appear as party respondent	33	33
Order permitting Denver Union Stock Yard Company to appear	34	34
Transcript of proceedings before the Secretary of Agriculture	34	34
Complaint	39	39
Formal notice of filing of complaint	41	42
Answer	45	44

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 16, 1957

	Original	Print
Transcript of proceedings before the Secretary of Agriculture—Continued		
Motion for order to require complainant to produce specified books and records for examination and copying	50	48
Affidavit of L. M. Pexton	52	51
Reply to motion for order to require complainant to produce specified books and records for examination and copying filed by respondent	55	54
Motion to strike complainant's reply to respondent's motion for order to require complainant to produce specified books, etc.	58	57
Stay order	61	60
Memorandum from Assistant General Counsel to Hearing Clerk	62	60
Statement	63	61
Notice of argument on motion	63	62
Telegraphic withdrawal by American Farm Bureau Federation of motion to intervene	64	63
Notice of oral argument on motions	64	63
Affidavit of W. C. Crew in support of motion to require production of certain books and records, etc.	65	64
Interim ruling and notice of hearing	71	70
Exceptions of complainant to interim ruling and notice of hearing	73	72
Complainant's election to rest	73	72
Respondent's motion to dismiss	74	73
Certification by Hearing Officer to Judicial Officer	74	73
Answer of complainant to motion to dismiss	75	74
Exceptions by complainant to recommendation of Hearing Examiner that this proceeding be dismissed	75	74
Order allowing briefs amicus curiae	76	75
Minute entry of argument and submission	78	76
Opinion, Lewis, J.	79	77
Judgment	92	84
Note re mandate	92	84
Designation by Secretary of Agriculture of additional portions of transcript to be contained in reproduced record (filed August 27, 1956)	93	85
Clerk's certificate (omitted in printing)	96	87
Orders allowing certiorari	97	87

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES and EZRA TAFT BENSON, Secretary of Agriculture, Respondents.

PETITION TO REVIEW DECISION AND ORDER OF THE SECRETARY OF AGRICULTURE—Filed August 9, 1956

To the Above-Entitled Court and the Honorable Judges Thereof:

Producers Livestock Marketing Association, herein referred to as Petitioner, petitions this Honorable Court to review the Decision and Order of the Secretary of Agriculture, dated June 18, 1956 and entered June 19, 1956, in proceedings had and taken under the Packers & Stockyards Act 1921, 42 Stat. 159, 163, et seq., 7 U.S.C. § 181, § 201, et seq., entitled "Producers Livestock Marketing Association, Complainant, vs. The Denver Union Stockyard Company, Respondent, P & S Docket No. 2176".

Jurisdiction of the Court

This Court has jurisdiction of the subject matter of this proceeding by virtue of the Administrative Procedure Act, as amended, Chapter 19A (Review of Orders of Federal Agencies) 64 Stat. 1129. Title 5, U.S.C. § 1032. 5 U.S.C.A. Cum. Supp. Volume, 1955 Annual Pocket Part § 1032, Page 236.

Facts on Which Venue Is Based

Petitioner is a Utah corporation. It is authorized to [fol. 2] *to* business in Colorado, New Mexico, Utah and

Wyoming, within the Tenth Judicial Circuit. It has its principal office in Salt Lake City, Utah. Under said Administrative Procedure Act, as amended, Petitioner is therefore entitled to and does file this petition for review in the United States Court of Appeals for the Tenth Circuit.

Nature of the Proceedings as to Which Review Is Sought

This proceeding is brought to review the Decision and Order of the Secretary of Agriculture entered by and through his duly delegated Judicial Officer. The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated by the Secretary to the Judicial Officer under authority of the Reorganization Act and Regulations of the Secretary thereunder. 54 Stat. 81. 5 U.S.C. § 516(b). 10 F.R. 13769. 19 F.R. 74.

Petitioner is a "market agency" as defined by the Packers & Stockyards Act. "Market agency" means, under the Act, any person engaged in the business of buying or selling in commerce livestock at a stockyard on commission basis. (In other words, a commission firm.) 7 U.S.C. § 201. Petitioner is duly registered with the Secretary of Agriculture, as required by the Act. 7 U.S.C. § 203.

Denver Union Stockyard Company owns and operates the Denver Union Stockyards (a stockyard "posted" as subject to the Act) at Denver, Colorado. It is thus a "stockyard owner" as defined by the Act. 7 U.S.C. § 201. A "stockyard", under the Act, means any place, establishment or facility commonly known as a stockyard, conducted as a public market, consisting of pens, etc. in which livestock are held or kept for sale or shipment in commerce. 7 U.S.C. § 202.

Petitioner operates and for years has operated as a market agency, buying and selling on commission at the Denver Stockyards, also at other yards throughout the West. It also buys and sells in the country throughout the West.

The Act provides that every stockyard owner (1) must furnish stockyard services on request "without discrimi-

nation", also (2) must establish and observe "just, reason-
[fol. 3] able and non-discriminatory regulations and practices" in the furnishing of stockyard services and every unjust, unreasonable or discriminatory regulation or practice "is prohibited and declared to be unlawful". 7 U.S.C. § 205, § 208.

On May 11, 1955 Denver Union Stockyard Company issued its "Tariff No. 14", effective May 25, 1955. The tariff contained a regulation, Item 10 (c), which was entitled and which purported to deal with "Interference With Operations". This, in effect, said that all market agencies (and dealers) who do business at the Denver Union Stockyard (1) are now prohibited from doing business at outside feed yards or in the country, (2) are now prohibited from diverting or interfering with the "normal flow" of livestock to the Denver Union Stockyard. This regulation concluded with its own definition of "area of normal flow" as being all of Colorado except approximately the East one-sixth (1/6th) thereof, as outlined by designated County boundaries and highways. The regulation is on Page 8 of the Decision.

By this regulation, Petitioner was forced to discontinue entirely its off-yard or country business in the forbidden country area—substantially all of Colorado; otherwise, it would have violated the regulation and undoubtedly suffered eviction from the Denver Stockyards. Therefore, a Petitioner attacked the regulation. It filed complaint against the Stockyard Company with the Secretary of Agriculture, as authorized by the Packers & Stockyards Act. Therein Petitioner pointed out that it was operating and for many years had operated at the Denver Stockyard. Also, at other stockyards in the country throughout the eleven Western States, and that under the Act, the Stockyard Company was a "public utility" and, as such, required to furnish stockyard services without discrimination and establish and observe just, reasonable and non-discriminatory regulations and practices, and that every unjust, unreasonable or discriminatory practice was prohibited and unlawful under the Act, and that Item 10 (c) was, therefore, illegal and void.

The Stockyard Company answered, asserting among other things, its right to so regulate and defending the validity of Regulation 10 (c), giving various reasons claimed to support its position.

[fol. 4] A "Hearing Examiner" made an "Interim Ruling" December 6, 1955, saying he thought the problem required a hearing on "the facts". He set the matter for hearing. To Petitioner, however, the question was solely one of law. Therefore, it elected to stand upon the regulation's illegality as a matter of law. Therefore, it filed its "Complainant's Election to Rest". This stated Petitioner's position (1) that the regulation was illegal and invalid upon its face as a matter of law, (2) that Petitioner elected to stand upon the illegality of the regulation as a matter of law, and, (3) would present no evidence, such being wholly unnecessary to determine the illegality of said regulation as a matter of law, and (4) wherefore, Petitioner therein rested and submitted its case for decision accordingly.

The Stockyard Company then filed a motion to dismiss for plaintiff's failure to "sustain the burden of making a prima facie case as evidenced by its election not to offer any proof".

The Hearing Officer conceded an oral hearing was no longer necessary. He thought the proceeding should be dismissed as demanded and certified the same to the Judicial Officer for decision, recommending dismissal.

Briefs and oral argument followed. The decision and order of the Secretary of Agriculture was entered June 19, 1956 by the Judicial Officer. A copy of said decision is Exhibit "A" hereto attached. The decision and order was that the regulation was not illegal upon its face and the complaint was dismissed.

Grounds on Which Relief Is Sought

The grounds upon which relief is sought and the points on which Petitioner intends to rely are:

1. Denver Union Stockyard Company is, under the Packers & Stockyards Act, 1921, bound and required to furnish stockyard services to Petitioner (and other market

agencies and dealers) without discrimination. It is a public utility in that regard.

2. The regulation in question is illegal and invalid on [fol. 5] its face as a matter of law since it denies service to Petitioner, and will not allow Petitioner to do business on the Denver Stockyards if Petitioner:

(a) Solicits any business for other markets, or for sale at outside feed yards or at country points, or endeavors to secure customers to sell or purchase livestock elsewhere; or

(b) Buys or sells, or does any business whatever, in said forbidden country area (except to route sales and business therein to or from the Denver Union Stockyards).

3. The regulation is illegal and invalid on its face as a matter of law, being in restraint of trade and an attempt, and tending, to monopolize and create a monopoly in trade or commerce, as prohibited by the Anti-Trust Laws of the United States.

The Relief Prayed

Petitioner prays:

That the order and decision of the Secretary of Agriculture hereinbefore mentioned be reviewed by this Court; that said Regulation 10 (c) of Denver Union Stockyard Company be determined and adjudged illegal and invalid and the order and decision of the Secretary be reversed and vacated, and for general relief.

H. P. Thomas, Frank Armstrong, E. M. Garrett,
Thomas & Armstrong, Attorneys for Petitioner.

August 8, 1956.

Filed August 9, 1956 with exhibit.

[fol. 6] EXHIBIT A TO PETITION

United States Department Of Agriculture

Before The Secretary Of Agriculture

Producers Livestock Marketing Association, Complainant v. The Denver Union Stock Yard Company, Respondent, P&S. Docket No. 2176.

Decision and Order

Preliminary Statement.

This is a proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.). On July 7, 1955, Producers Livestock Marketing Association filed a complaint pursuant to section 202.6 (b)[1] of the rules of practice (9 CFR 202.6 (b)) against the respondent. The complaint concerns Item 10 (c) of the respondents' Tariff No. 14 issued May 11, 1955, effective May 25, 1955, quoted below in Finding of Fact 3.

Paragraph 2 of the complaint[2] states that Producers Livestock Marketing Association is a registered market agency that has operated for many years as such at the respondent's stockyard and at other stockyards and that it has engaged in buying and selling at country points for livestock growers.

Paragraph 3 of the complaint submits that Item 10 (c) of the respondent's Tariff No. 14 is unauthorized and in- [fol. 7] valid under the act because (1) under the act the

[1] "§ 202.6 Formal complaints and other moving papers • • • (b) Who may file. Disciplinary proceedings may be instituted only upon moving papers filed by the Administrator, acting either as a result of the informal complaint procedure hereinbefore provided or on his own motion: Provided, That, if the Administrator should so determine, a proceeding filed pursuant to section 304 of the act or a proceeding involving the application of a regulation established or filed pursuant to section 307 of the act, may be instituted upon the moving paper filed by the person who filed the informal complaint."

[2] The paragraphs in the complaint as filed are not numbered but numbers have been assigned for purposes of clarity.

respondent is authorized to file with the Secretary of Agriculture only schedules of rates or practices affecting any rate or charge or regulations or practices in respect to the furnishing of stockyard services, and (2) the contested regulation in Item 10 (c) does not affect any rate or charge and does not relate to the furnishing of stockyard services.

Paragraphs 4 and 5 of the complaint allege that the respondent is a public utility under the act required to furnish reasonable service without discrimination and to establish just, reasonable and nondiscriminatory regulations and practices (sections 304 and 307 of the act), and that Item 10 (c) is unjust, unreasonable and discriminatory and should be set aside as unlawful.

Paragraph 6 of the complaint goes on to contend that under Item 10 (c) market agencies, including the complainant, will be:

"(a) Forbidden to handle livestock in the proscribed area direct to a packer, feeder or other outlet.

"(b) Forbidden to purchase in the proscribed area so as to meet competition and maintain volume for its outlets.

"(c) Forbidden to furnish market advice to its members in the proscribed area except advice that they ship to and sell at the Denver Stockyards. (Our Association is a non-stock farmers' marketing cooperative having members only.

The membership runs throughout the eleven Western States and elsewhere.)

"(d) Forbidden in case of a glut of livestock at the Denver yards, or otherwise to re-consign shipments of livestock to other stockyards; e. g., Omaha, Chicago or elsewhere to the advantage of the grower."

Paragraph 7 of the complaint is as follows:

"Our business has been built up over a period of more than twenty years by successful service to the livestock growers themselves. Some members or growers sell out- [fol. 8] right, others consign to us in the country for direct movement, still others ship to central markets. Many telephone or write our Denver office to inquire about market conditions, about whether to ship to Denver, to the West Coast or to Eastern markets. This Regulation absolutely

forbids in the proscribed area our buying, selling or taking consignments in the country except for movement to the Denver yards, and forbids in the proscribed area our furnishing the market advice or service above—except advice to the grower to ship to Denver Union Stockyards and no place else. It denies the growers in the proscribed area the service and advice they are justly entitled to."

In paragraph 8 of the complaint the complainant requests that Item 10 (c) of the respondent's Tariff No. 14 be set aside and annulled and that it be suspended pending the issuance of a decision and order to such effect.

The respondent filed an answer to the complaint admitting the issuance of Item 10 (c), admitting that the complainant operates as a market agency in the respondent's stockyard, and stating upon information and belief that the complainant or related organizations have been engaged in buying and selling livestock in the country surrounding the respondent's stockyard but demanding strict proof thereof. The answer denies the allegations in paragraph 3 concerning lack of authority to issue Item 10 (c), denies the allegations in paragraph 4 and alleges that it is required to furnish stockyard services only to those persons and organizations complying with reasonable regulations of the respondent, denies the allegations in paragraph 5 to the effect that Item 10 (c) is unjust, unreasonable or discriminatory, denies that paragraph 6 of the complaint contains a "completely correct interpretation" of Item 10 (c) as applied to the situations described therein and calls for proof of the nature and operation of the complainant's business described in paragraphs 7 and 8, and denies that Item 10 (c) has the effect alleged in the last sentence of paragraph 7.

The answer, in addition, contains affirmative defenses to the effect that the issuance of Item 10(c) was necessary:

(1) To enable the respondent and the market agencies [fol. 9] operating at respondent's stockyard to furnish, and to enable the patrons of the stockyard to receive, upon reasonable request, without discrimination, reasonable stockyard services at the stockyard since such would not be the case as long as certain market agencies and dealers operating at the stockyard engage in operations away from

the stockyard which make it impossible for them to carry out their primary duties and responsibilities at the respondent's stockyard.

(2) In order that the respondent might carry out its statutory duty to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices with respect to the furnishing of stockyard services at its stockyard since, in the absence of Item 10 (c), certain market agencies and dealers operating at the respondent's stockyard would engage also in activities elsewhere making it impossible for them to carry out their primary duties and responsibilities at the respondent's stockyard.

(3) In order to eliminate unjust, unreasonable and discriminatory practices followed by market agencies and dealers operating at the respondent's stockyard resulting from their activities in the area in Colorado contiguous to the stockyard which rendered it impossible for such market agencies and dealers to perform their duties and responsibilities at the respondent's stockyard.

(4) In order to prevent market agencies and dealers operating at the respondent's stockyard from engaging in a practice with respect to livestock in the area contiguous to the respondent's stockyard, described in Item 10 (c), which created an undue, unreasonable and unlawful advantage, prejudice and preference as between persons and localities in intrastate commerce in livestock and interstate commerce in livestock and an undue, unjust, unreasonable and unlawful discrimination against interstate commerce in livestock resulting from the diversion of livestock from the respondent's stockyard, the consequent fluctuation in prices of livestock handled in interstate commerce at such stockyard and the failure of some market agencies and dealers operating at the respondent's stockyard to carry out their duty to render reasonable stockyard services at the respondent's stockyard and to establish and observe [fol. 10] just, reasonable and nondiscriminatory practices at such stockyard with respect to the furnishing of stockyard services.

The answer asks for oral hearing and contends that there is no authority in the act to suspend Item 10 (c) since it is

not a new regulation or practice affecting any rate or charge.

Subsequent to the answer, respondent filed a motion with an accompanying affidavit for an order requiring the complainant to produce specified books and records for examination and copying. The motion recited that the books and records requested were competent, relevant and material to the issues raised in the proceeding. The complainant filed a reply to the motion stating as its sole ground for opposition that Item 10 (c) in invalid as a matter of law because (1) the issuance of Item 10 (c) is not authorized by the act, (2) Item 10 (c) is illegal and invalid on its face because it restrains trade, divides the territory in which market agencies and dealers at the respondent's stockyard may operate between areas in which they may operate and areas in which they may not operate except in connection with the respondent's stockyard and because it reduces competition for the livestock of farmers and ranchmen in the proscribed area who may wish to sell their livestock direct without having it go through a stockyard and denies market agencies and dealers at the respondent's stockyard the right to do business in the proscribed area unless done with respect to the respondent's stockyard, and (3) Item 10 (c) on its face is unjust and unreasonable.

The respondent filed a motion to strike the complainant's reply as not responsive to respondent's motion to examine.

Oral argument was held before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, at Washington, D. C., on October 21, 1955. The respondent at that time submitted an additional affidavit in support of its motion to examine. Briefs were filed by the parties. On December 6, 1955, the hearing examiner issued an interim ruling in which he held that the contested regulation was not invalid on its face and he set the matter down for hearing at Denver, Colorado, on [fol. 11] January 24, 1956. The hearing examiner also indicated that he would grant respondent's motion if examination of the complainant's books and records was necessary after complainant presented its case. On December 23, 1955, complainant in a document entitled, "Complainant's Election to Rest," waived oral hearing and submitted the matter

for final determination on the contention that the disputed regulation was illegal on its face as a matter of law. Respondent then filed a motion to dismiss the complaint with prejudice because of the complainant's failure to prosecute the proceeding by making out a prima facie case. On December 28, 1955, the hearing examiner certified the proceeding to the Judicial Officer for decision, pursuant to section 202.10 (b) of the rules of practice (9 CFR 202.10 (b)) with a recommendation that it be dismissed. Complainant filed exceptions to the hearing examiner's recommendation and requested oral argument and the right to submit briefs.

Motions were filed by the Oklahoma Live Stock Marketing Association, the National Live Stock Commission Company, the National Feeder Service Corporation, the National Live Stock Producers Association, and the American Farm Bureau Federation for leave to file briefs and amici curiae and Charles B. Heinemann, Jr., filed a motion for leave to file a brief amicus curiae and to participate in the oral argument. On February 24, 1956, the applications or motions were granted, and the briefs to be filed were limited to the question of whether the contested regulation is invalid on its face. The request of Charles B. Heinemann, Jr., to participate in the oral argument was denied. Earlier in the proceeding, the American Farm Bureau Federation had filed and subsequently withdrawn a motion for leave to intervene. The parties and the interested persons filed briefs and oral argument was held before the Judicial Officer on April 30, 1956.

Findings of Fact

1. The complainant, Producers Livestock Marketing Association, is a cooperative marketing association registered with the Secretary of Agriculture under the act as a market agency to buy and sell livestock on a commission basis at [fol. 12] the Denver Union Stockyards, Denver, Colorado, a stockyard posted as subject to the act, and at other posted stockyards.

2. The respondent, The Denver Union Stock Yard Company, is a corporation that owns and operates the Denver Union Stockyards, Denver, Colorado.

3. The Denver Union Stock Yard Company on May 11, 1955, issued its Tariff No. 14, effective May 25, 1955, containing its schedule of rates and charges for stockyard services rendered by it and its rules and regulations, including Item 10 (c) which reads, in part, as follows:

> "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—
>
> "(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> "(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock yard; or
>
> "(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.
>
> "The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows: * * *
>
> "The provisions of paragraph (c), do not apply on livestock solely used for breeding purposes."

4. The act provides, in part, as follows:

> "Sec. 2. (a) * * * (6) The term 'commerce' means commerce between any State, Territory, or possession, [fol. 13] or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. (b) For the purpose of this Act (but not in anywise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article in part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products,

livestock products, dairy products, poultry, poultry products, or eggs are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through report being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nation. * * *

"Sec. 301. When used in this Act--

"(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, *in commerce*, of livestock;

"(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

"(d) The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling *in commerce* livestock at a stockyard, either on [fol. 14] his own account livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. [Emphasis supplied.]

"Sec. 302. (a) When used in this title the term 'stockyard' means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appur-

tenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held or kept for sale or shipment *in commerce*. * * * [Emphasis supplied.] * * *

"Sec. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: * * *

"Sec. 306. * * * (e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary . . . may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; * * *

"Sec. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. * * *

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the [fol. 15] just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

"Sec. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, *not in commerce*, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." [Emphasis supplied.]

Conclusions

I. The respondent's motion to dismiss with prejudice for failure of the complainant to sustain the burden of [fol. 16] making a prima facie case in support of its complaint is based upon the complainant's election not to ad-

duce evidence at a hearing following the hearing examiner's ruling that the disputed regulation was not invalid on its face and that a hearing upon the facts was necessary. Of course such a motion would be granted if such a ruling were made by a judge in a United States District Court and a complainant thereafter failed to present evidence. But here the ruling was made by a hearing examiner and, under our practice, rulings of hearing examiners are recommendatory only and subject to review by the Judicial Officer. The complainant was free to waive hearing and to stake the outcome of the proceeding solely upon the question as to whether the disputed regulation is invalid on its face as a matter of law. Although no formal motion for judgment was filed by the complainant, it accomplished the same thing by requesting a ruling in its favor. Accordingly, the motion to dismiss for failure to make a prima facie case is denied insofar as it seeks dismissal without final adjudication of the issues of law made by the complainant.

We have, then, a situation in which there has been no hearing upon the facts and for that reason somewhat detailed descriptions of the complaint and answer have been given in the Preliminary Statement above. From these descriptions it is seen that the respondent denies that the complainant has given a completely accurate account in the complaint of the effects of Item 10 (c), demands proof of the nature of the complainant's business, and sets up four affirmative defenses. Such is the nature of the record upon which the arguments as to the invalidity of Item 10 (c) must be evaluated. Consequently, we have for decision not the question as to whether Item 10 (c) is valid or invalid but only the question as to whether Item 10 (c) is *invalid on its face*.

II. The complainant first contends that the regulation is invalid on its face because stockyard owners can issue only such regulations as are authorized by the act, that the act authorizes the issuance only of regulations in respect to the furnishing of stockyard services or those which affect rates or charges and that Item 10 (c) is not such a regulation.

The major premise of the complainant's syllogism is de-
[fol. 17] fective. Stockyard owners are not required to find the source of their authority to issue rules or regulations governing the use of their property in the provisions of the act. Public utilities generally have always had the power at common law to issue such rules or regulations. 73 C.J.S., Public Utilities § 6; Am. Jur., Public Utilities and Services § 38. Of course, the rules or regulations must pass the legal tests of reasonableness, etc., but on this part of the complainant's case the issue is only as to whether the respondent can issue *any* rules or regulations not specifically authorized by the act and not whether a rule or a regulation issued is invalid. We are addressing ourselves at this point then *only to the question as to whether the authority to issue rules or regulations by a stockyard owner must be found in the act.*

The regulatory scheme established in the act does not preempt the entire scope of a stockyard company's activities, but is limited in its operation to the supervision of the major function of stockyards, that is, the furn[illegible]g of stockyard services and the assessment of charge[illegible] such services. Title III of the act, and sections 304, 305 and 307 in particular (7 U.S.C. 205, 206 and 208), places an affirmative duty upon stockyard owners in connection with rates and charges and the furnishing of stockyard services and declares certain practices with respect thereto to be unlawful. The statute is silent, however, as to stockyard activities which do not constitute the furnishing of such services or the assessment of rates or charges with respect thereto, and the legislative history of the act failed to disclose any intent to regulate such activities.[3] Stockyards engage in numerous activities which are not "stockyard
[fol. 18] services." Properties such as straw barns used

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[3] See, e.g., H.R. Rep. No. 77, 67th Cong., 1st Sess. (1921); Sen. Rep. No. 96, 67th Cong., 1st Sess. (1921); Sen. Doc. No. 59, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 324, 67th Cong., 1st Sess. (1921); Hearings before Committee on Agriculture on H.R. 14, 232, 5034 and 5692, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1799-1817, 1860-1882, 1885-1890, 1913-1932, 2035-2036, 2257, 2319-2325, 2377-2392, 2486-2500, 2553-2554, 2560-2571, 2697-2713, 4529, 4642-4644, and 4778-4787 (1921).

for storing straw for bedding railroad cars, manure barns, and wash racks for cleaning and washing trucks are not considered to be used and useful for rate purposes. See *In re St. Louis National Stockyards Company*, 2 A.D. 664, 673-675 (1943). The activities generally conducted on such properties do not constitute stockyard services as that term is defined in the act and it cannot be said that the Congress was attempting to regulate such activities when it enacted the Packers and Stockyards Act, 1921, as amended. "Congress had no intention of regulating the entire business of the livestock and meat industry." *De Vries* v. *Sig Ellingson & Co.*, 110 F. Supp. 781 (D. Minn. 1951), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953). The Secretary would have no jurisdiction over the activities conducted on such stockyard company property unless, of course, some relation to stockyard services and rates and charges was found. As in similar *regulatory* statutes, the scope of the jurisdiction conferred upon the regulatory authority, the Secretary in this case, over the industry to be regulated is limited to the jurisdiction conferred in the enabling statute. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Pennsylvania Railroad Co.* v. *Public Utilities Commission of Ohio*, 298 U.S. 170 (1936); *United States* v. *Pennsylvania Railroad Co.*, 242 U.S. 208 (1916); *Southwestern Bell Telephone Co.* v. *United States*, 45 F. Supp. 403 (W.D. Mo. 1942).

Even as to the matters under the Secretary's jurisdiction, the right to conduct the business of a stockyard remains in the stockyard company just as it did before the enactment of the statute *subject to the powers of inquiry and control given the Secretary by the act. Farmers Union Livestock Ass'n* v. *Saint Paul Union Stockyards Co.*, 97 F. Supp. 539 (D. Mont. 1951); *Acker* v. *United States*, 12 F. Supp. 776 (N.D. Ill. 1935), aff'd, 298 U.S. 426 (1936); *Holland Houfburg* v. *Kansas City Stock Yards Company of Maine*, 283 S.W. 2d 539 (Mo. 1955).

In any event, the minor premise of the complainant's syllogism is erroneous. The complainant claims that the disputed regulation bars market agencies and dealers at the respondent's stockyard from doing business off the

stockyard in the proscribed area and that, consequently, [fol. 19] the regulation is not one in respect to the furnishing of stockyard services at the respondent's stockyard. The regulation cannot be viewed properly in such isolation. It must be read in connection with the rest of the respondent's tariff and regulations and clearly Item 10 (c) attaches conditions or limitations upon the furnishing of stockyard services by the respondent at its stockyard. Outright refusal to furnish any stockyard services to a market agency has been held to be within the jurisdiction of the Secretary under the act as a matter in respect to the furnishing of stockyard services at a stockyard. *Sioux City Stockyards Co.* v. *United States*, 49 F. Supp. 801 (N.D. Iowa 1943); *Purcell* v. *The Union Stock Yard & Transit Company of Chicago*, 13 A.D. 365 (1954); *Alfred L. Dougherty* v. *The Union Stock Yard & Transit Company of Chicago*, 13 A.D. 239 (1954); *Flynn* v. *Kansas City Stock Yards Co.*, 12 A.D. 14 (1953). Certainly a regulation which places limitations upon the continued rendering of stockyard services is one in respect to the furnishing of stockyard services.

It is concluded, then, that the complainant has not shown that Item 10 (c) is invalid on its face for lack of authority or power for its issuance. If we agreed with the complainant that the regulation is not one in respect to the furnishing of stockyard services by the respondent, we would have to dismiss the complaint as being outside the Secretary's jurisdiction since, as we have noted above, the act confers control by the Secretary only over rates and charges and the furnishing of stockyard services.

III. The complainant argues also that the respondent's Item 10 (c) is illegal on its face because it violates section 311 of the act quoted above in Finding of Fact 4. Section 311 came into the case initially because the fourth affirmative defense in the respondent's answer alleges that the issuance of Item 10 (c) was necessary to prevent market agencies and dealers operating at the respondent's stockyard from engaging in a practice with respect to livestock in the area specified in Item 10 (c) which created an undue, unreasonable and unlawful advantage, prejudice and preference as between persons and localities in intrastate com-

merce in livestock and interstate commerce in livestock and an undue, unjust, unreasonable and unlawful discrimination against interstate commerce in livestock by reason [fol. 20] of diversion of livestock from the respondent's stockyard, etc.

In argument subsequent to the filing of the respondent's answer, the complainant sees in section 311 a statutory right to engage in business in the country, that is, off the respondent's stockyard, and claims that only the Secretary of Agriculture can take action pursuant to section 311 and that since the respondent has issued Item 10 (c) the respondent has thereby precluded the Secretary from ever being able to invoke section 311 with respect to activities in the area designated in Item 10 (c) on the part of market agencies and dealers at the respondent's stockyard and that for these reasons Item 10 (c) is illegal.

The Complainant and the respondent share the view that the language in section 311 " . . . rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission, receiving . . . *not in commerce* of livestock . . . " [Emphasis supplied.] refers to country operations, that is, activities off a posted stockyard. Assuming this view to be correct, which we doubt, we do not see how Item 10 (c) can be held to be in violation or conflict with section 311 so construed in the absence of a hearing upon the facts.

Whatever rights market agencies at stockyards have to operate in the country, they do not derive them from Title III of the act. Title III is a statutory regulation superimposed upon the conduct of stockyard owners, market agencies and dealers and not a grant of substantive powers to those regulated. And the complainant's contentions as to Item 10 (c) conflicting with section 311 are based upon one of four affirmative but unproved defenses of the respondent in its answer, a defense which omits the basic jurisdictional requisite of section 311, namely, that the practice aimed at by Item 10 (c) is a practice of a stockyard owner or market agency "not in commerce" which creates unlawful advantage between persons or localities in intrastate commerce and interstate or foreign commerce in live-

stock or unlawfully discriminates against interstate commerce in livestock.

Assuming, however, that this affirmative defense attempts to justify Item 10 (c) under section 311, there is no sup- [fol. 21] porting evidence to this effect in the proceeding and if this affirmative defense were to be taken as true for the purposes of final decision herein on the theory that the complainant has in effect demurred to the respondent's answer or has asked for judgment on the pleadings, the other three affirmative defenses in the answer alleging necessity for the issuance of the regulation to carry out the respondent's statutory obligations would also have to be taken as true. But of course the allegations being conclusions are not to be taken as true and remain unproved. *Cacek* v. *Munson*, 160 Neb. 187, 69 N.W. 2d 692 (1955). As is seen from section 311, it is rates, charges, practices, etc., "not in commerce" that provide the jurisdictional basis for the application of section 311 and the respondent would have considerable difficulty in proving its allegation since it is evident that many if not most of the transactions which would be reached by the respondent's Item 10 (c) would be just as much "in commerce" as transactions at the respondent's stockyard in view of the broad definition of "in commerce" contained in section 2 of the act.

In addition, as we have said above, we doubt that the parties are correct in their construction of section 311. We are unaware of any administrative interpretation of the act during its 35 years of existence that places upon section 311 the meaning advanced by the parties and we do not believe that the internal construction of the act supports such meaning. Title III of the act carefully defines "stockyard" in section 302 (a) as a place in which livestock is handled "*in commerce*," it defines "market agency" as a person in a specified business *in commerce* at a *stockyard* and proceeds to authorize control by the Secretary of Agriculture over stockyard services, rates, charges, practices, etc., that by definition or otherwise are limited to activities in commerce at a stockyard which by definition is itself a place handling livestock *in commerce*. Except for section 311, the regulatory authority given the Secretary is over transactions *in commerce* at a *stockyard*.

In describing the coverage of section 311 as to things "not in commerce," the same language is used as in the definition of "stockyard services." Such latter term could not be used because it is defined to mean such services *in commerce* at stockyards and the employment of the same language in section 311 as in the definition of "stockyard services" tends to show that what was meant were services at a [fol. 22] stockyard that are "not in commerce."

Resort to the legislative history of the act shows that the Congress in enacting the statute was very concerned (see e.g., H.Rep. No. 77, 67th Cong., 1st Sess. (1921) about the constitutionality of regulating affairs at a stockyard because of former decisions of the Supreme Court to the effect that such affairs were local and intrastate. *Hopkins* v. *United States*, 171 U.S. 578 (1898); *Anderson* v. *United States*, 171 U.S. 604 (1898). In view of the careful delimiting of the Secretary's powers in all provisions of Title III except section 311 to matters at a *stockyard* that are *in commerce*, section 311 appears to have been utilized to cover situations in which some matters at a stockyard might be considered by the courts as being "not in commerce."[4]

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[4] See e.g., the letter from the Secretary of Agriculture contained in the Hearings before the House Agriculture Committee on Meat Packer Legislation, January 3, 1921, p. 26, incorporated into the House Committee Hearings (p. 276) of May 1921 on H.R. 14, H.R. 232, H.R. 5034 and H.R. 5692, which reads in part as follows (p. 27): "It appears that the bill has been very carefully drafted with the constitutional limitations upon the Federal Government clearly in mind. The definition of commerce in the second paragraph of the bill is somewhat broader than that usually found in the statutes, and there may be a question as to its constitutionality.

"It was probably drafted with the decision of the Supreme Court in Texas Co. v. Sabine Tram Co. (227 U.S. 111), and similar decisions in mind; and in view of those decisions there may be various states of facts and circumstances to which its application will be held to be within the power of the Federal Government. You are no doubt familiar with the decisions of the Supreme Court in Hopkins v. United States (171 U.S. 578), and Anderson v. United States (171 U.S. 604). The Hopkins case is cited with approval in Blumenstock Bros. v. Curtis Publishing Co. (252 U.S. 436), in which the court said: 'We held, in Hopkins v. United States (171 U.S. 579), that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate

It is true of course that *Stafford* v. *Wallace*, 258 U.S. 495 (1922), has been regarded as having the effect of holding that every transaction at posted stockyards, at [fol. 23] least the major ones, is in interstate commerce. The parties argue that because of the Court's opinion in that case, the "not in commerce" provisions of section 311 must relate to transactions outside the stockyard. The answer to this is simply that if *Stafford* v. *Wallace* so holds, it has turned out that it was needless for Congress to have worried about the constitutionality of Title III and it was unnecessary to have enacted section 311 and to have included the words "in commerce" anywhere in Title III except in the definitions of the persons subject to jurisdic-[fol. 24] tion. It does not follow that if Congress had been legally overcautious in framing the act, the surplusage should find a new and different meaning than intended.

Pertinent also to our inquiry here is the legislative setting for section 311 which indicates strongly that the section may extend only to conflict between state and Federal regulations and primarily to the overruling by the Secre-

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commerce, although much of the live stock was sent from other States (p. 443).'

"If the court adheres to these decisions, the bill, in so far as it affects the stockyards and the commission men, would seem to be limited to what are purely interstate transactions which would probably constitute a small part of the business in view of those decisions. But if there is even a small part of the business with respect to which the Federal Government could control the rates, charges, and practices, the commission men and stockyards operators would probably, for practical reasons, not enforce different rates, charges, and practices as to intrastate business, so that control of the purely interstate business would tend to regulate the whole business. This is probably what the framers of the bill had in mind.

"Section 311 of the bill proposes to give the Interstate Commerce Commission jurisdiction over intrastate business in live stock when this is necessary to prevent discrimination against interstate or foreign commerce in that business. This is no doubt based upon the decision of the Supreme Court in the Shreveport Rate case (234 U.S. 342). It seems doubtful whether the live-stock business is of such a character that such discrimination could be effected, but the provision should prove helpful in case of such discrimination."

tary of rates or charges fixed by state authority.[5] The practice claimed by the respondent as aimed at by Item 10 (c) does not appear to be a practice imposed or required by any state authority. So that whether or not section 311 covers off-the-stockyard transactions, Item 10 (c) still would probably not conflict with section 311.

IV. We proceed next to consideration of issues raised by the complainant and the *amici* that are based upon the nature of the respondent's business, that is, a public service or public utility business. They claim that Item 10 (c) forces the complainant and all in its position to market livestock from the designated area through respondent's stockyard or not at all and that this violates all basic legal concepts applicable to public utilities. They contend that Item 10 (c) on its face violates the act and is unlawful [fol. 25] generally because it is unfair, unreasonable, discriminatory, contrary to public policy as in restraint of trade, etc. The complainant and the *amici* cite cases such as *Coombs* v. *Burk*, 180 P. 59, 40 Cal. App. 102 (1919), *State* v. *Citizens Tele. Co.*, 39 S.E. 257, 61 S.C. 83 (1901), and *People* v. *Public Service Commission*, 148 N.Y. 583 (1914), condemning exclusive patronage requirements by utilities through contracts or practices. They also cite cases such as *Garner* v. *City of Aurora*, 30 N.W. 2d 917, 149 Neb. 295 (1948), and *Ten Brock et al.* v. *Miller et al.*, 216 N.W. 385, 240 Mich. 667 (1927), illustrating the rule that a utility may not refuse its utility service because of some matter

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[5] Chairman Haugen of the House Agriculture Committee explained section 311 of his bill H.R. 14 (later substantially enacted as the statute), which is the same as section 311 of the act, as follows (Hearings on H.R. 14, H.R. 232, H.R. 5034 and H.R. 5692, May 1921, p. 10): "Section 311 is modeled after section 13 of the Interstate Commerce Act in respect to conflict between State and Federal regulations." The debate on the floor of the House about section 311 revolved around the lawfulness and wisdom of supplanting Federal regulation of intrastate activities at stockyards for state regulation of such activities. 61 Cong. Rec. 1813, 1868-1869, 1928-1930 (1921). Section 311 was *copies* from par. 4, section 13, of the Interstate Commerce Act as amended by section 416 of the Transportation Act of 1920 (41 Stat. 484, 49 U.S. 13 (1940), which authorized the Interstate Commerce Commission to fix rates for intrastate transportation on interstate carriers or systems superseding rates fixed by state railroad commissions.

collateral to the utility function such as the termination of water service because of failure to pay a garbage collection bill. The complainant cites *South Florida R. Co.* v. *Rhoads*, 5 So. 633, 25 Fla. 40 (1889), in which it was held that the reasonableness of a carrier's regulation was a question of law for the court and that a railway could not refuse to transport a passenger wearing a cap of a steamship line competing with steamship lines which had an agreement with the railway.

The cases cited to illustrate the illegality of exclusive patronage requirements by utilities through contracts or practices are expressions of public policy by the various state courts and generally involve utilities franchised as monopolies by municipalities or similar political subdivi-s-ons and in many of the cases the utility's right to use public property such as streets and highways, the power of eminent domain, or other rights of a similar public nature were important considerations in the court decisions and provide the basis for the public policy that even a partial restraint of trade by such utilities may be bad. Nevertheless even in the field of traditional public utilities there is much authority to the effect that a utility is not required to serve competitors who resell the service (e.g., *People* v. *Public Service Corporation*, 181 N.Y. 259 (1920), distinguishing *People* v. *Public Service Corporation*, *supra*; *Florida Power and Light Co.* v. *State*, 144 So. 657, 107 Fla. 317 (1932); *Rogers Iron Works* v. *Joplin Waterworks Co.*, 18 S.W. 2d 420, 323 Mo. 122 (1929)). Similarly, a utility has not been compelled to give its property to the use and benefit of a rival as a member of the general public to be served (*Evansville & H.R.* v. *Henderson B. Co.*, 134 [fol. 26] Fed. 973 (1904) and it has also been ruled that "unjust discrimination" does not forbid just discriminations that are incident to the protection of organic rights (*State* v. *Jacksonville Terminal Co.*, 106 So. 576, 90 Fla. 721 (1925)).

None of the cases cited by the complainant and the *amici* had the posture of our proceeding, namely, a record consisting only of a complaint and an answer which denies that the complaint accurately describes the effects of the disputed regulation, denies the legal conclusions of the complaint and sets up affirmative defenses which allege

that the regulation is necessary in order the the respondent may carry out its statutory duties.

It is generally the case that whether or not there is unjust discrimination by a utility depends upon the surrounding circumstances. Am. Jur., Public Utilities § 42. The question is one of fact, *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481 (1918), and it is only when the facts are ascertained that the question of unreasonableness is for the court. 13 C.J.S., Carriers § 352. "In determining the reasonableness and validity of [a utility's] rules and regulations it is obvious that each case must depend largely upon the circumstances involved." 30 L.R.A. (N.S.) 493. The reasonableness of a regulation issued by a carrier subject to the Interstate Commerce Commission must be determined by preliminary resort to the Interstate Commerce Commission because the inquiry is essentially one of fact and of discretion in technical matters and uniformity can be secured only if determination is left to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Hewitt* v. *New York, N.H. & H.R. Co.*, 29 N.E. 641, 284 N.Y. 117 (1940).[6] In at least one case, *Platt* v. *Lecocq*, 158 Fed. 723 (8th Cir. 1907), it has been said that a carrier's regulations are presumptively reasonable and that the ". . . burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them." Con- [fol. 27] cerning exclusive patronage contracts by public utilities, *Harding Glass Co.* v. *Twin City Pipe Line Co.*, 39 F.2d 408 (8th Cir. 1930), which goes into the problem thoroughly, states at p. 412, "A dominant question to be considered in each case is whether the contract involved is injurious to the public interest, *and each case must be judged by its own circumstances.*" [Emphasis supplied.]

It is generally the case, then, that the reasonableness of a utility's regulation necessarily involves factual inquiry

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[6] Under these cases there need to be no preliminary resort to the Interstate Commerce Commission on pure questions of law and there would likewise be no need for preliminary resort to the Secretary on the case here as made by the complainant.

and this is true whether unjust discrimination is regarded separately or as bound up in the question of reasonableness.

In *South Florida R. Co.* v. *Rhoads*, *supra*, the entire question of reasonableness was left to the jury. This was held to be error and the question of reasonableness was decided to be one for the court because if left to juries different juries might reach different results with respect to the same regulation. Such a rationale no longer has vitality with respect to regulations by carriers subject to the Interstate Commerce Commission in view of the necessary preliminary resort to the Interstate Commerce Commission and, of course, the reasonableness of stockyard company regulations must first be adjudicated by the Secretary before resort to court for the same reasons. It is to be observed, too, that in the *South Florida R. Co.* case heavily relied upon by the complainant, the court held also that the question of whether there was a bona fide agreement by the carrier with steamship lines, that is, one not entered into for the purpose of an oppressive monopoly, was a mixed question of law and fact properly left to the jury to decide.

The complainant's use of the doctrine that a utility cannot refuse its utility service for collateral reasons misses the mark because the complainant presents an imperfect analogy. In the light of the respondent's answer, we cannot say on this record that Item 10 (c) is unconnected with the furnishing of stockyard services at the respondent's stockyard and that there is no more relation between Item 10 (c) and the furnishing of stockyard services by the respondent than there is between payment for garbage collection and the furnishing of water or between payment for electrical appliances sold by a utility and the utility's [fol. 28] service of providing power.

A stockyard company is no doubt a public service company. But the applicability of the cases dealing with franchised monopolies cited by the complainant and the *amici* or the cases cited where the utility was not required to provide service depends upon the nature of the services offered by the respondent, the relationship of the market agencies and dealers to the stockyard, the effects of the contested regulation, and other relevant and material facts which are not before us. For example, the regulation in

part prohibits conduct on the stockyard company's property that diverts livestock in the designated area from the respondent's stockyard. The complainant and the *amici* would have us rule without hearing the facts that it is illegal on its face for the respondent to prohibit the use of its facilities and services for the carrying on of business in competition with the respondent. In other words, we conclude that unreasonableness, illegal discrimination, contrariety to public policy as in restraint of trade, etc., with respect to Item 10 (c) cannot be determined on the present record and that the general rule applies, namely, that the issues made in this respect can be decided only after the relevant and material facts are ascertained. We are not prepared to say that nothing in the respondent's answer has a material bearing on the outcome of the proceeding.

V. Lastly, complainant contends that Item 10 (c) of respondent's tariff is an invalid restraint of trade in violation of Federal antitrust laws[7] because it denies "to the

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[7] Section 1 of the Sherman Act (15 U.S.C. 1) provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ." Section 2 of the Sherman Act (15 U.S.C. 2) reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." Section 3 of the Clayton Act (15 U.S.C. 14) is as follows: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[fol. 29] market agencies and dealers operating at the stockyard of Respondent the right to do any business in livestock in the proscribed area except the animals go through that stockyard, denies them that freedom of action and of contract that our anti-trust laws were enacted to assure; and likewise denies to the farmers, ranchmen and other sellers of livestock in the proscribed area the right to sell their livestock to or through such market agencies and dealers without having their livestock go through the stockyard of Respondent." It is argued by the respondent, on the other hand, that the validity of the contested regulation is not to be decided under the Federal antitrust laws but in the light of the meaning and objectives of the Packers and Stockyards Act, 1921, as amended, citing *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

Complainant relies, in part, upon the pronouncements of the Supreme Court in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), to establish that Item 10 (c) is violative of the Federal antitrust laws. The *International Salt* case involved the validity under section 1 of the Sherman Act and section 3 of the Clayton Act of a contract tying the sale of a non-patented to a patented product, and the *Standard Oil* case dealt with the validity of requirements *contracts* under section 3 of the Clayton Act. Aside from the questions of whether respondent's regulation may properly be categorized as a "tying" arrangement or a requirements contract or whether [fol. 30] section 3 of the Clayton Act properly applies,* these two cases cited by complainant do not lead us to the result desired on the basis of the record before us. For a violation of section 3 of the Clayton Act it is necessary to establish that the lease, sale or contract for sale meeting the requirements set forth in that section would probably

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* Section 3 of the Clayton Act would not appear to be applicable to the facts of this case as, among other reasons, it is doubtful whether stockyard services constitute "goods, wares, merchandise, machinery, supplies, or other commodities" under such section. United States v. Investors Diversified Services, 102 F. Supp. 645 (D. Minn. 1951).

lessen competition or tend to create a monopoly in a line of commerce. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936). Under section 1 of the Sherman Act, it has long been held that the reasonableness or unreasonableness of the restraint is an element to be considered. *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911). *Both of these tests or considerations are questions of fact, the solution of which rests upon the conditions obtaining in each particular case.* *United States* v. *Standard Oil Co. of California*, 78 F. Supp. 850 (S.D.Cal. 1948) (*affirmed*, 337 U.S. 293 (1949), *supra*). While in the *International Salt* case the Court held on a motion for summary judgment that the admitted facts left no genuine issue for trial as it is unreasonable, *per se*, to *foreclose competitors* from any *substantial* market, the pleadings or admissions of fact were sufficient to enable the Court to conclude that the volume of business affected by the "tying" contracts involved therein "cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *International Salt Co.* v. *United States*, *supra*, at page 396. The Court there had before it the number of patent license agreements involved, the amount of salt sold by the patentee for use in the patented machines and the monetary value of such salt. In this proceeding, no comparable information is before us. Monopolistic position in the market for the "tying" product has not been established. See *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). The record is lacking also in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, [fol. 31] the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter. We cannot find on the basis of the facts before us that Item 10 (*c*) forecloses competitors from any substantial market; that the volume of business affected by the contested regulations is significant or substantial; and that the regulation neces-

sarily tends to the accomplishment of monopoly. In fact, on the basis of the record; it is not even possible to determine whether the alleged restraint of trade is a "restraint of trade or commerce *among the several States, or with foreign nations.*" [Emphasis supplied.] Although it is not thought that complainant would have difficulty establishing the applicability of section 1 of the Sherman Act to the commerce in livestock conducted in the designated area (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*; 334 U.S. 219 (1948); *United States* v. *Employing Lathers Association of Chicago and Vicinity*, 347 U.S. 198 (1954)), no evidence to that effect has been presented.

Nor does the *Standard Oil* case render any assistance to complainant. The Court there held that requirements contracts transgressed section 3 of the Clayton Act whenever they foreclosed competition in a substantial share of the line of commerce affected. The factual content for the rule of law expressed in the *Standard Oil* case is lacking in this proceeding. Moreover, subsequent decisions have retreated in the direction of requiring a greater degree of proof to establish a foreclosure of competition and a consequent violation of section 3 of the Clayton Act. See *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). See also Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 137-149 (1955).

Complainant also cites *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), dealing with exclusion of a competitor from facilities for the receiving and sale of fresh fruits and vegetables. Violation of the antitrust laws was found there because of monopoly power to deny a competitor access to the market. Complainant is not here alleging exclusion from the posted stockyard but, rather, a limitation [fol. 32] of its activities in the area defined in Item 10 (c). The evidence in this proceeding is not sufficient to enable us to determine the status of the complainant and respondent in the proscribed area, that is, the extent of competition, the degree of monopoly power of respondent, if any, at Denver or in the proscribed area or whether monopoly power, if possessed, has been used to foreclose competition,

to gain a competitive advantage or to destroy a competitor. See *United States* v. *Griffith*, 334 U.S. 100, 106-108 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944). The problems posed by the alleged monopoly and restraint of trade in this proceeding are unique and before Item 10 (c) can be properly related to the anti-trust laws it is necessary that there be a great deal more in the way of a record then we have here.

We are not by this decision saying that Item 10 (c) of respondent's regulations is valid under the Federal anti-trust laws. We merely hold that the record is insufficient for a determination that Item 10 (c) violates such laws.

VI. To recapitulate, we conclude that upon the limited record before us we cannot find that the contested regulation of the respondent is invalid upon its face. This conclusion applies to the arguments made on behalf of dealers as well as those advanced by the complainant and the *amici* with respect to market agencies. Our ruling is strengthened by the fact that section 310 of the act requires that a "full hearing" precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. A similar provision is contained in the Interstate Commerce Act (49 U.S.C. 15 (1)). In *Baltimore and O.R. Co.* v. *United States*, 277 U.S. 291, 299, 300 (1928), the Supreme Court said of a challenged carrier's regulation, "... the Commission would not be authorized to set it aside without evidence that it is unjust, or unreasonable."

Since the complainant has elected to waive hearing upon the facts and to have final determination made upon its proposition that Item 10 (c) is illegal upon its face [fol. 33] and we have concluded that we cannot agree with the complainant, the complaint should be dismissed. Under the circumstances, the dismissal has the same effect as if dismissal were ordered after a hearing upon the facts. We see no particular need, then, for mentioning in the order that the dismissal is with prejudice.

ORDER

The complaint herein is dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D. C., this 18th day of June, 1956.

Thomas J. Flavin (Signed), Judicial Officer.

Received June 19, 1956. The Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture.

IN UNITED STATES COURT OF APPEALS

MOTION OF THE DENVER UNION STOCK YARD COMPANY TO APPEAR AS PARTY RESPONDENT—Filed August 16, 1956

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Tenth Circuit:

The Denver Union Stock Yard Company moves the Court for leave to appear as a party respondent in the above-entitled proceeding on the ground that it was the party in interest in the proceeding before the Judicial Officer of the Department of Agriculture, whose order the petitioner herein seeks to have reviewed, and, accordingly, is the party whose interest would be affected if the order sought to be reviewed is enjoined, set aside, suspended, or determined to be invalid, and, therefore, pursuant to Title V; U.S.C., Section 1038, may appear as a party to this proceeding, on its own motion and *and* of right, and be represented by counsel in this proceeding for review of such order.

[fol. 34] Winston S. Howard, Dawson, Nagel, Sherman & Howard.

Ashley Sellers, Cummings, Sellers, Reeves & Conner.

Filed August 16, 1956.

IN UNITED STATES COURT OF APPEALS

ORDER PERMITTING DENVER UNION STOCK YARD COMPANY TO APPEAR—August 17, 1956

Before Honorable Sam G. Bratton, Chief Judge.

On motion, it is ordered that Denver Union Stock Yard Company may appear as party respondent in this cause.

Transcript of Proceedings Before the Secretary of Agriculture

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United States of America, Department of Agriculture

September 17, 1956

Pursuant to Title 28, United States Code, Section 1733, I hereby certify:

1. That there are now in this Department the following described documents in the proceeding entitled "Producers Livestock Marketing Association, Complainant, v. Denver Union Stock Yard Company, Respondent," P. & S. Docket No. 2176, arising under the Packers and Stockyards Act, 1921, as amended (7 U.S.C., 1952 ed., secs. 181-231):

(1) Complaint, filed July 7, 1955

(2) Copy of letter, dated 7-5-55, serving complaint

(3) Letter, dated 7-6-55, that L. S. Hulbert is attorney for Producers Livestock Marketing Association, filed by complainant 7-8-55

(4) Respondent's answer to complaint (oral hearing requested), filed 7-29-55

[fol. 35] (5) Respondent's motion for order requiring complainant to produce specified books and records for examination and copying, filed 8-12-55

(6) Affidavit of L. M. Paxton, filed 8-12-55

(7) Complainant's reply to motion for order to require complainant to produce specified books and records for examination and copying, filed 3-24-55.

(8) Motion to strike complainant's reply to respondent's motion for order to require complainant to produce specified books and records

(9) Stay order, filed by Hearing Examiner 9-15-55

(10) Memorandum to Hearing Clerk transmitting statement of the Director of Livestock Division for filing in the record, filed 9-21-55

(11) Statement of Director of Livestock Division, filed 9-21-55

(12) Motion by American Farm Bureau Federation for leave to intervene, filed 9-21-55

(13) Respondent's opposition to motion by American Farm Bureau Federation for leave to intervene, filed 9-27-55

(14) Respondent's motion for order fixing time within which to file memoranda respecting motion by the American Farm Bureau Federation for leave to intervene, filed 9-27-55

(15) Notice to argument on motion, filed by Hearing Examiner 9-28-55

(16) Telegram that American Farm Bureau Federation withdraws motion to intervene, filed 10-3-55

(17) Notice of Oral Argument on Motion, filed by Hearing Examiner

(18) Affidavit of W. C. Crew, Vice President and General [fol. 36] Manager of Denver Union Stock Yard Company, filed 10-21-55

(19) Transcript of oral argument held before Hearing Examiner 10-26-55

(20) Brief for complainant, filed 11-3-55

(21) Copy of joint letter, filed 11-3-55, serving brief, and giving notice that reply brief due 11-18-55

(22) Respondent's brief, following oral argument of 10-21-55, filed 11-18-55

(23) Interim Ruling and notice setting hearing for 1-24-56, filed by Hearing Examiner 12-6-55

(24) Letter, dated 11-21-55, requesting two changes be made in brief filed 11-18-55, filed by respondent

(25) Exceptions of complainant to interim ruling and notice of hearing, filed 12-15-55

(26) Letter transmitting complainant's Election to Rest, filed 12-23-55

(27) Complainant's Election to Rest, filed 12-23-55

(28) Respondent's motion to dismiss, filed 12-27-55

(29) Certification to Judicial Officer for decision, with recommendation that proceeding be dismissed, filed by Hearing Examiner 12-28-55

(30) Respondent's memorandum in support of its motion to dismiss, filed 12-29-55

(31) Complainant's answer to motion to dismiss, filed 12-29-55

(32) Complainant's exceptions to recommendation of Hearing Examiner that proceeding be dismissed, and requesting oral argument before Judicial Officer, filed 12-29-55

[fol. 37] (33) Complainant's memorandum answering respondent's memorandum in support of its motion to dismiss, filed 1-3-56

(34) Copy of letter by Judicial Officer to parties' attorneys, prior to holding oral argument, setting time for filing briefs, filed 1-12-56

(35) Motion of Oklahoma Marketing Association, National Livestock Commission Company, and National Feeder Service Corporation, for leave to file amicus curiae brief, filed 1-16-56

(36) Motion of National Live Stock Producers Association to appear as amicus curiae and to file brief, filed 1-17-56

(37) Respondent's opposition to motion of Oklahoma Live Stock Marketing Association, National Live Stock Commission Company, and National Feeder Service Corporation for leave to file amicus curiae brief, filed 1-20-56

(38) Respondent's opposition to motion of National Live Stock Producers Association to appear as amicus curiae and file brief, filed 1-20-56

(39) Complainant's document favoring granting the motion of National Livestock Producers Association to appear as amicus curiae and filed brief, filed 1-30-56

(40) Complainant's document favoring granting the motion of Oklahoma Livestock Marketing Association, National Livestock Commission Company, and National Feeders Service Corporation for leave to file amicus curiae, filed 1-30-56

(41) Petition of American Farm Bureau Federation for leave to file brief as amicus curiae, filed 1-30-56

(42) Petition of Charles B. Heinemann, Jr., for permission to file briefs and participate in oral argument as an amicus curiae, filed 1-30-56

[fol. 38] (43) Respondent's opposition to petition of Charles B. Heinemann, Jr., for permission to file briefs and participate in oral argument as an amicus curiae, filed 1-30-56

(44) Respondent's opposition to petition by American Farm Bureau Federation for leave to file brief as Amicus curiae, filed 2-2-56

(45) Answer to respondent's opposition, filed by Charles B. Heinemann, Jr., 2-2-56

(46) Complainant's document favoring granting petitions to appear as amicus curiae by Charles B. Heinemann, Jr., and by American Farm Bureau Federation, filed 2-3-56

(47) Complainant's brief following certification of case to the Judicial Officer, filed 2-10-56

(48) Order allowing briefs amicus curiae, filed by Judicial Officer 2-24-56

(49) Copy of Judicial Officer's letter, dated 2-28-56, extending time for filing respondent's reply brief to 3-17-56, and giving complainant seven days after service of respondent's reply brief in which to file a brief in answer to respondent's reply brief

(50) Brief of National Livestock Producers Association as amicus curiae following certification of case to the Judicial Officer, filed 2-29-56

(51) Brief of American Farm Bureau Federation as amicus curiae following certification of case to Judicial Officer, filed 3-16-56

(52) Brief of amicus curiae, by Charles B. Heinemann, Jr., filed 3-16-56

(53) Respondent's reply brief to brief filed by complainant following certification of proceeding to the Judicial Officer, filed 3-16-56

[fol. 39] (54) Copy of letter, dated 3-16-56, to complainant's attorney serving respondent's reply brief.

(55) Brief of Oklahoma Live Stock Marketing Association, National Livestock Commission Company, and Na-

tional Federal Service Corporation as amicus curiae following certification of case to Judicial Officer, filed 3-19-56

(56) Complainant's reply brief to respondent's brief filed following certification to Judicial Officer, filed 3-26-56

(57) Order issued 3-27-56 by Judicial Officer, at request of respondent, that respondent may file briefs by 4-9-56 in answer to briefs amici curiae which have been filed.

(58) Respondent's reply to briefs of amici curiae, filed 4-9-56

(59) Letter, dated 4-16-56, requesting corrections be made in respondent's reply to briefs of amici curiae

(60) Copy of letter of 4-16-56, by Judicial Officer, notifying parties' attorneys that oral argument will be held on 4-30-56

(61) Transcript of oral argument held 4-30-56 before the Judicial Officer

(62) Copy of letter, dated 5-1-56, by the Judicial Officer giving 20 days after 5-1-56 to file briefs on *on* question as to whether section 311 of the Packers and Stockyards Act, 1921, has any application to transactions off a posted stockyard, that is to so-called "country" operations

(63) Complainant's brief relative to the question of whether section 311 of Packers and Stockyards Act, 1921, has any application to transactions off a posted stockyard, that is to so-called "country" operations, filed 5-21-56

(64) Respondent's brief concerning application of section 311 to the Packers and Stockyards Act, 1921, to so-[fol. 40] called "country" operations

(67) Decision and Order issued June 18, 1956, by Thomas J. Flavin, Judicial Officer

2. That a true and correct copy of the original of each of said documents is attached hereto.

(Seal) By direction of the Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

(Seal) Thomas J. Flavin, Judicial Officer

BEFORE THE SECRETARY OF AGRICULTURE
COMPLAINT—Filed July 7, 1955

Hon. Ezra Taft Benson, Secretary of Agriculture, United States Department of Agriculture, Washington, D.C.

Dear Sir: Re: Complaint, Producers Livestock Marketing Association vs. Denver Union Stockyards Company. Denver Union Stockyard Company, a posted stockyard under the Packers & Stockyards Act and Regulations, issued May 11, 1955, effective May 25, 1955, its Tariff No. 14. In said Tariff No. 14 is the following:

"

Item 10.

"

Interference With Operations

" (a) ....

" (b) ....

" (c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at [fol. 41] outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its inter-

section with U.S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

Producers Livestock Marketing Association is a market agency registered with the Secretary of Agriculture as required by the "Packers & Stockyards Act, 1921" and, as such, has operated for many years at said stockyards and at other stockyards also in the Western States; also, buying and selling at country points for livestock growers.

We respectfully submit that under the Packers & Stockyards Act of 1921 that the Denver Union Stockyard Company is authorized only to file a schedule with the Secretary of Agriculture stating "a new regulation or practice effecting any rate or charge"; and that it is authorized by that [fol. 42] Act only to establish "regulations and practices in respect to the furnishing of stockyard services"; and that regulation or practice purported to be prescribed or established by Item 10 (c) as aforesaid does not affect any rate or charge and does not relate to the furnishing of stockyard services and is therefore unauthorized and invalid.

Denver Union Stockyards is in fact a public utility under the Act, required to furnish reasonable service "without discrimination" and to "establish, observe and enforce just, reasonable and non-discriminatory regulations and practices . . . (and) every unjust, unreasonable or discriminatory practice is prohibited and declared to be unlawful". 7 U.S.C.A. § 205. § 208.

Without waiving the proposition stated above that the Denver Union Stockyard Company is entirely without authority under the Packers & Stockyards Act of 1921 to issue the regulation or to attempt to establish the practice herein objected to, we respectfully submit that subdivision (c) of Item 10 of Denver Union Stockyards Tariff No. 14 is unjust, unreasonable and discriminatory and should be set aside as unlawful. To our minds, there is no difference in law in this practice which purports to

deny market agencies and dealers the right to render services within the proscribed area unless the livestock in question is to be consigned to the Denver Union Stockyards, than of a railroad company which would deny freight service to a shipper who also shipped by truck; or an airline which denies passenger service to one who also travels by rail; or a public power company denying service to one who also uses gas; or a public water company denying culinary water to one who also receives water from an adjacent spring or purchases bottled water from another supplier; etc., etc. There is no difference, as we see it, between the examples noted and the one herein challenged.

Under this Regulation, commission firms and market agencies (including our Association) will be:

(a) Forbidden to handle livestock in the proscribed area direct to a packer, feeder or other outlet.

[fol. 43] (b) Forbidden to purchase in the proscribed area so as to meet competition and maintain volume for its outlets.

(c) Forbidden to furnish market advice to its members in the proscribed area except advice that they ship to and sell at the Denver Stockyards. (Our Association is a non-stock farmers' marketing cooperative having members only. The membership runs throughout the eleven Western States and elsewhere.)

(d) Forbidden in case of a glut of livestock at the Denver yards, or otherwise to re-consign shipments of livestock to other stockyards; e.g., Omaha, Chicago or elsewhere to the advantage of the grower.

Our business has been built up over a period of more than twenty years by successful service to the livestock growers themselves. Some members or growers sell outright, others consign to us in the country for direct movement, still others ship to central markets. Many telephone or write our Denver office to inquire about market conditions, about whether to ship to Denver, to the West Coast or to Eastern markets. This Regulation absolutely forbids in the proscribed area our buying, selling or taking consignments in the country except for movement to the Denver yards, and forbids in the proscribed area our furnishing the market advice or service above—except ad-

vice to the grower to ship to Denver Union Stockyards and no place else. It denies the growers in the proscribed area the service and advice they are justly entitled to.

We respectfully request:

1. That subdivision (c) of Item 10 of Denver Union Stockyards Company Tariff No. 14 be set aside and annulled.

2. That, meanwhile, the provisions of said subdivision (c) be suspended by the Secretary of Agriculture or proper authority thereunder until the order and decision of the Department upon said subdivision can be made.

[fol. 44] Respectfully,

Producers Livestock Marketing Association, By /s/ Lyman S. Hulbert, Its Attorney, 744 Jackson Place, N.W., Washington 6, D.C.

Received July 7, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

FORMAL NOTICE OF FILING OF COMPLAINT—July 8, 1955

United States Department of Agriculture
Office of the Secretary
Washington 25, D. C.

Jul 8 1955

Registered Mail, Return Receipt Requested

Denver Union Stockyards Company, 100 Livestock Exchange Building, Denver 16, Colorado.

Mr. Ashley Sellers, Sellers & Conner, Attorneys at Law, 1625 Rye Street, N.W., Washington 6, D. C.

Gentlemen: Subject: Producers Livestock Marketing Association v. Denver Union Stockyards Company—P. & S. Docket No. 2176. Enclosed is a copy of a complaint under the Packers and Stockyards Act, 1921, as amended, which has been filed in behalf of Producers Livestock Marketing Association naming you as respondent.

In view of the nature of this complaint it has been decided that formal action will be instituted in accordance with section 202.6 (b) of the rules of practice governing proceedings under the act. A copy of the rules of practice is enclosed for your information. You will note that sections 202.5 through 202.22 are applicable to disciplinary proceedings. In this proceeding the burden of proof will be upon the complainant to establish the matters complained of.

In accordance with these rules of practice, you may have 20 days after the receipt of this letter within which to file with the Hearing Clerk an answer, in quadruplicate, containing a definite statement of the facts which constitute [fol. 45] the grounds of defense, and specifically admitting, denying, or explaining each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Your answer, as well as any motions or requests that you may wish to file hereafter in this proceeding, should be addressed to the Hearing Clerk, United States Department of Agriculture, Washington 25, D.C.

Very truly yours,

/s/ Agnes B. Clarke, Hearing Clerk

ERMeyer
7-8-55

cc: L.D. Sinclair, P & S Branch, Livestock Division, AMS
Charles B. Jennings, Room 403 L.S. Exch. Bldg. Stockyards Station, Denver 16, Colo. Lyman S. Hulbert, Attorney at Law, 744 Jackson Place, N.W., Washington 6, D.C.
Enclosures 2

BEFORE THE SECRETARY OF AGRICULTURE

ANSWER—Filed July 29, 1955

Comes now the respondent and answers the complaint as follows:

1. With respect to paragraph 1 of the complaint*, the respondent did, on May 11, 1955, issue its Tariff No. 14, effective May 25, 1955, containing its schedule of rates and charges for its stockyard services and all of its rules and regulations, currently effective, including Item 10 (c) of its rules and regulations as quoted in the complaint, but, in so far as Item 10 (c) is concerned, this merely constituted an amendment to the item as originally issued by the respondent on January 27, 1955, effective February 10, 1955.

[fol. 46] 2. With respect to paragraph 2 of the complaint (page 2), it is true that an organization known as the Producers Livestock Marketing Association is presently operating as a market agency at the Denver Union Stockyards, and that it has so operated for a number of years. Respondent also is informed and believes that such organization or related organizations have been engaged in buying and selling livestock in the country surrounding the Denver Union Stockyards or elsewhere either on their own accounts or for others, but the respondent is without exact knowledge as to the truth or falsity of all the other allegations and demands strict proof thereof.

3. With respect to paragraph 3 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions or arguments as to which no answer is required, but, in so far as an answer may be proper, the respondent denies the same and alleges that Item 10 (c) of its rules and regulations does not affect any of its rates and charges set forth in its currently effective schedule of rates and charges and that Item 10 (c) is a regulation in respect to the furnishing of stockyard,

* The complaint is in the form of a letter from the Producers Livestock Marketing Association, by its attorney, Lyman S. Hulbert, to the Secretary of Agriculture, dated July 7, 1955, consisting of four pages and divided into eight paragraphs.

services by the respondent, and furthermore is a reasonable, fair, and non-discriminatory rule and regulation, lawfully made. The term "stockyard services" as defined in the Act contemplates and includes far more than the mere physical handling of the livestock.

4. With respect to paragraph 4 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions as to which no answer is required, but, in so far as an answer may be deemed appropriate, the respondent denies the same and alleges that it is required to furnish stockyard services only to those persons and organizations who comply with the reasonable rules and regulations of the respondent.

5. With respect to paragraph 5 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions or arguments as to which no answer is required, but, in so far as an answer may be deemed proper, the respondent denies the same and denies that Item 10 (c) of its rules and regulations is unjust, unreasonable, or discriminatory.

[fol. 47] 6. With respect to the allegations of paragraph 6 of the complaint (page 3), the respondent is informed and believes that, except with respect to those allegations in paragraph 6 (c) regarding the nature and operations of the complainant, no answer is required since such allegations are merely purported legal interpretations of Item 10 (c) of the respondent's rules and regulations—which regulations speak for themselves—, but in so far as an answer may be deemed to be required, the respondent denies that paragraph 6 of the complaint contains a completely correct interpretation of Item 10 (c), as applied to the situations described therein. The respondent also is without information as to the truth or falsity of the allegations in subparagraph (c) of paragraph 6 concerning the nature and operations of the complainant and demands strict proof thereof.

7. With respect to the first three sentences of paragraph 7 of the complaint (page 3), the respondent is without information as to the truth or falsity of the allegations con-

tained therein with respect to the history and nature of operations of the complainant and demands strict proof thereof. With respect to the allegations contained in the fourth sentence of paragraph 7 (bottom of page 3 and top of page 4), such allegations merely repeat the allegations set forth in subparagraph (a) of paragraph 6 and the first sentence of subparagraph (c) of paragraph 6 of the complaint (page 3). This respondent again denies.

Affirmative Defenses

As affirmative defenses, the respondent alleges that—

8. It was necessary to issue Item 10 (c) of respondent's rule and regulations to enable it and the market agencies operating at the Denver Union Stockyards to furnish, upon reasonable request, without discrimination, reasonable stockyard services at such stockyards, and to enable the patrons of the Denver Union Stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services at this stockyards, since the respondent and the market agencies at such stockyards can not furnish, nor can their patrons receive, reasonable stockyard serv- [fol. 48] ices at the Denver Union Stockyards as long as certain market agencies and dealers operating at such stockyard engage in operations away from this stockyard (now prohibited by Item 10 (c)) which will render it impossible for such market agencies and dealers to carry out their primary duties and responsibilities at the Denver Union Stockyards.

9. It was necessary for the respondent to establish, and it is necessary for it to enforce, Item 10 (c) in order to carry out its statutory duty to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices with respect to the furnishing of stockyard services at the Denver Union Stockyards, since, except for Item 10 (c), certain market agencies and dealers operating at the Denver livestock market also would engage in activities elsewhere (now prohibited by Item 10 (c)) which would make it impossible for them to carry out their primary duties and responsibilities at the Denver Union Stockyards.

10. It was necessary to issue Item 10 (c) in order to eliminate unjust, unreasonable, and discriminatory practices followed by market agencies and dealers, operating at the Denver Union Stockyards, resulting from their activities in the area in Colorado contiguous to this stockyards, specified in Item 10 (c) of the regulation, which rendered it impossible for such market agencies and dealers to perform their duties and responsibilities at this market.

11. It was necessary to issue Item 10 (c) to prevent market agencies and dealers operating at the Denver Union Stockyards from engaging in a practice with respect to livestock in the area contiguous to the Denver Union Stockyards specified in Item 10 (c) which created an undue, unreasonable, and unlawful advantage, prejudice, and preference as between persons and localities in intrastate commerce in livestock and interstate commerce in livestock, and an undue, unjust, unreasonable, and unlawful discrimination against interstate commerce in livestock, resulting from the diversion of livestock from the Denver Union Stockyards, the consequent fluctuation in prices of livestock handled in interstate commerce at such stockyards, [fol. 49] and the failure of some market agencies and dealers operating at the Denver Union Stockyards to carry out their duty to render reasonable stockyard services at the Denver market and to establish and observe just, reasonable and non-discriminatory practices at such stockyards in respect to the furnishing of stockyard services.

12. With reference to the complainant's request that Item 10 (c) be suspended pending the outcome of this proceeding, there is no authority in the law to suspend Item 10 (c) since, as alleged in paragraph 3 of the complaint (page 3), Item 10 (c) is not "a new regulation or practice affecting any rate or charge" set forth in the respondent's currently effective schedule of rates and charges contained in its Tariff Number 14.

Wherefore, the premises considered, the respondent requests that it be granted an oral hearing at Denver, Colorado, that complainant's request for interim suspension

of Item 10 (c) be denied, and that the complaint be dismissed.

Respectfully submitted,

The Denver Union Stock Yard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, 320 Equitable Building, Denver 2, Colorado, Telephone Acoma 2-1611, By /s/ Ashley Sellers, Sellers & Conner, 1625 Eye Street, Northwest, Washington 6, D.C.

Dated: July 29, 1955.

Received July 29, 1955. Hearing Clerk

[fol. 50] BEFORE THE SECRETARY OF AGRICULTURE

MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING—Filed August 12, 1955

Comes now the respondent, by its attorneys, and moves for an order requiring the complainant to produce the books and records hereinafter specified for examination or copying by the respondent at complainant's office located in Room 309, Livestock Exchange Building at the Denver Union Stockyards, Denver, Colorado, or such other place as may be specified in such order, on the 19th day of September, 1955, at 10:00 a.m., m.s.t.

The books, papers, letters and other documents of the complainant with respect to which this request is made are as follows:

(1) All of the accounts of sales and accounts of purchases, and such other records, including contracts of sale and contracts of purchase and related memoranda and communications pertaining to all livestock sales and purchase transactions either by the complainant or its wholly owned subsidiary, the Western Order Buyers, or by the employees of the complainanat and of its said subsidiary for the account of the complainant, from July 1, 1951 to and including June 30, 1955, in the area specified in Item 10 (c) of respondent's rules and regulations (i.e., in the

area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska State Line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U.S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence South on Highway 71 to Timpas; thence Southwesterly via Highway 350 to Trinidad; thence South to New Mexico state line).

(2) The payroll list or other records showing the names and addresses of all of the employees of the complainant and its wholly owned subsidiary, the Western Order Buyers, and all records showing names and addresses of members of complainant during the period July 1, 1951 to and including June 30, 1955, who made purchases or sales of [fol. 51] livestock for the account of the complainant in the area specified in Item 10 (c) of the respondent's rules and regulations as indicated above.

As grounds in support of the foregoing motion, the respondent respectfully alleges as follows:

In the early part of July 1955, there was served upon the respondent a complaint filed by the complainant challenging the validity of Item 10 (c) of the respondent's rules and regulations originally effective February 10, 1955, as amended effective May 25, 1955, on the grounds that such item of the respondent's regulations is unauthorized and invalid under the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 et seq., and that such regulation is unjust, unreasonable, and discriminatory. Thereafter, on July 29, 1955, the respondent filed its answer in which it denied the material allegations of the complaint and in which the respondent set forth certain affirmative defenses. In view of the issues raised by the complaint and answer, it is essential in this proceeding for the complainant to make known of record the true facts with respect to its operations during the period July 1, 1951 through June 30, 1955, inclusive, in the area designated in Item 10 (c) of the respondent's rules and regulations specified above,

away from the Denver Union Stockyards where the complainant is a registrant, whether such operations were conducted by the complainant in its own name or for its account by its subsidiary or by the employees of either the complainant or such subsidiary.

Examination of the books and records specified above will disclose the volume of livestock which has been purchased or sold by the complainant away from the Denver Union Stockyards within the geographical area designated above, which livestock would normally have been consigned to the Denver Union Stockyards and which thus has been diverted from such stockyards by the complainant. It is such diversion of livestock away from the Denver Union Stockyards by the complainant and others which would prevent the patrons of the Denver Union Stockyards from receiving reasonable stockyard services as required by the Packers and Stockyards Act of 1921, as amended, and would, further, create an undue advantage, prejudice, preference and discrimination with respect to interstate commerce in [fol. 52] livestock—to eliminate which, the respondent was required to issue Item 10 (c) of its rules and regulations. The information requested in paragraph (2) above would permit the respondent to identify such transactions as were made in the names of individual employees of the complainant, or of its subsidiary, for the account of complainant or its subsidiary.

The books and records requested herein to be produced by the complainant are, therefore, competent, relevant and material to the issues raised herein. They are under the exclusive control and exclusive possession of the complainant or its agents and employees; and they are not available to the respondent except by virtue of the requested order. Accordingly, since these materials are indispensable to a complete record on the issues raised by the complainant by the pleadings, it is respectfully requested that this motion be granted and that an order be entered directing the complainant to appear at the time and place requested

herein and to produce for examination and copying, by the respondent, the books and records described above.

Respectfully submitted,

The Denver Union Stockyard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By /s/ Ashley Sellers, Sellers & Conner

[Verified.]

Received August 12, 1956. Hearing Clerk

State of Colorado City and County of Denver SS

AFFIDAVIT OF L. M. PEXTON IN SUPPORT OF MOTION

L. M. Pexton, being first duly sworn, deposes and says as follows:

My name is L. M. Pexton and I am President of the Denver Union Stock Yard Company, the respondent in a proceeding instituted under the Packers and Stockyards [fol. 53] Act of 1921, as amended, 7 U.S.C. 181 et seq. to inquire into the validity of Item 10 (c) of the rules and regulations issued by the respondent originally on January 27, 1955, amended effective May 25, 1955, with respect to the furnishing of stockyard services at the Denver Union Stockyards. Such proceeding was instituted upon the basis of a complaint by the Producers Livestock Marketing Association, an organization presently operating as a market agency at the Denver Union Stockyards.

This affidavit is made by me in support of a motion filed by the respondent in the above-mentioned proceeding to require Producers Livestock Marketing Association, the complainant in such proceeding, to produce certain books and records for examination and copying by the respondent.

Upon the basis of information and belief, it is my understanding that during the period July 1, 1951 to June 30, 1955, the complainant, while registered as a Market Agency for the conduct of a commission agency business at the Denver Union Stockyards continually diverted away from

the Denver Union Stockyards a large volume of livestock originating within the geographical area designated in Item 10 (c) of the respondent's rules and regulations which is an area immediately contiguous to the Denver Union Stockyards. This livestock normally would have been consigned to the Denver Union Stockyards.

I am informed and believe that the complainant, among other things, diverted lambs from the area in question which normally would have been consigned to the Denver market by selling such lambs direct to many packers, both national and independent, including some located on the Atlantic Coast and in interior Iowa, and further, I am informed and believe that the complainant made such diversions at the very same time that it was purporting to be using its best efforts to secure for its patrons on the Denver market, the highest possible price by selling lambs at the Denver market.

It is further my information and belief that, in many cases, the complainant made many of its sales both at the Denver market and away from the Denver market in the area in question to the same packers and feeders.

[fol. 54] It is also my information and belief that in addition to purchasing and selling livestock in the designating area during the period in question on a commission basis, the complainant frequently purchased livestock in such area on speculation for its own account at the same time that it was acting as agent for others either at the Denver market or off the Denver market.

It is my information and belief that the foregoing and many like transactions were conducted by the complainant in its own name or for its account by its wholly owned subsidiary, the Western Order Buyers, or by the employees of the complainant or its said subsidiary. The foregoing activities of the complainant injured the patrons of the Denver Union Stockyards—both buyers and sellers—primarily by diverting from the Denver market livestock which normally would have been shipped to the market, with a consequent adverse effect on the prices received by the patrons at this market. As a result, the Denver Union Stock Yard Company in the early part of this year issued item 10 (c) of its rules and regulations which was designed

to make it possible for the patrons of the Denver market to secure, without discrimination, reasonable stockyard services at this stockyard and to eliminate an unjust, unreasonable, and discriminatory practice by the complainant and others and to remove an undue prejudice and discrimination against interstate commerce in livestock. The Denver Union Stockyards must, under the law, take pains to see that its patrons are not subjected to such harmful effects as that referred to herein. The management of the Stock Yard Company felt that, as pointed out by the Secretary of Agriculture on many occasions, market agencies operating at a public stockyard are not mere businessmen, free to do as they might wish for business reasons alone, but are public agencies occupying a fiduciary position, with an overriding duty to their market and to their patrons at the market where they are registered and that all of their other activities must be subordinated to this end. Consequently, it was felt that market agencies may not engage in transactions away from the Denver market inconsistent with the duties imposed upon them to render the best possible service which, when boiled down, means that they must refrain from diverting the normal flow of livestock to this market if they are to continue to *to* oper-
[fol. 55] ate at the market.

All of the facts regarding the activities of the complainant which give rise to the rule in question may be proved by examination of the records kept by the complainant with respect to its sales and purchases, during the period in question, in the designated area in Colorado. The names and addresses of the employees of the complainant and of its subsidiary are needed so as to enable the respondent to identify the sales for the account of the complainant which, upon the basis of information and belief, it is believed that the complainant caused to be made in the names of its employees or those of its subsidiary. The complainant itself has raised these issues with respect to its so-called country operations and the information concerning them is in the exclusive custody and control of the complainant. The only way the respondent can show the true facts is to secure the information from the complainant as requested in the motion under consideration. I believe all of the in-

formation is competent, relevant and material to the issues involved.

L. M. Pexton

Subscribed and sworn to before me this 10th day of August, 1955.

My commission expires Dec. 2, 1958

(Seal) /s/ Eve M. Roger, Notary Public

Received August 12, 1956

BEFORE THE SECRETARY OF AGRICULTURE

REPLY TO MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING FILED BY RESPONDENT—Filed September 7, 1955

Comes now the Complainant, by its attorney, and shows that it is not required to allow Respondent to examine its books and records as stated in said Motion because the regulations that are challenged in the above entitled proceeding were issued without authority of law and are en- [fol. 56] tirely unauthorized by the Packers and Stockyards Act, 1921. Said challenged regulations appear in Respondent's Tariff No. 14 issued May 11, 1955, effective May 25, 1955 and read as follows:

" Item 10.

" Interference With Operations

" (a) ....

" (b) ....

" (c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock

from this market which would otherwise normally come to this Stock Yards; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of live stock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U.S. Highway 36; to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on [fol. 57] Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on live stock solely used for breeding purposes."

Said Packers and Stockyards Act of 1921 by its terms restricts the regulations that Respondent may issue to regulations under 7 U.S.C. 207 (b) in connection with a schedule of rates and charges "which in any manner change, affect, or determine any part or the aggregate of such rates or charges or the value of the stockyard services furnished" or to regulations under 7 U.S.C. 208 "in respect to the furnishing of stockyard services"; and the term "stockyard services" as used in said Act is defined in 7 U.S.C. 201 (b) as follows:

"the term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;"

Inasmuch as the challenged regulations do not relate to rates or charges or to stockyard services as defined in this Act, they are not authorized by the Packers and Stockyards Act, 1921 and are therefore invalid and beyond the powers of Respondent.

Complainant, by its attorney, further shows that said challenged regulations are on their face illegal and invalid because they restrain trade, divide the territory in which any market agency or dealer engaged in business on the Stockyard of Respondent may operate into some territory in which he may operate and into other territory in which he may not operate unless he is doing so with respect to the Stockyard of Respondent; and thus in the *proscribed* area the challenged regulations reduce competition for the livestock of those farmers and ranchmen who desire to sell their livestock direct without having it go through any stockyard; and denies to all market agencies and dealers engaged in business at the Stockyard of Respondent the right to do business in the prescribed area unless such business is done with respect to the Stockyard of Respondent.

Complainant, by its attorney, further shows that said challenged regulations are on their face unjust and unreasonable.

[fol. 58] In view of the foregoing considerations, Complainant respectfully asks that it be found that said challenged regulations are invalid and of no force and effect; and that Complainant is not required to permit Respondent to examine and make copies of its books and records, as demanded by Respondent.

Complainant by its Attorney further shows that Western Livestock Order Buyers (Western Order Buyers) is not a subsidiary, wholly owned or otherwise, of Complainant and that Complainant has no right, power or authority to make its books and records available to Respondent as prayed for in Respondent's Motion to which this pleading is a reply.

Complainant, by its Attorney, hereby requests an oral hearing on the questions herein presented and respectfully requests that said oral hearing be held in Washington, D. C. at an early date. The privilege of submitting briefs on the questions herein presented is also requested.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received August 24, 1955. Hearing Clerk.
Filed Sept. 7, 1955.

MOTION TO STRIKE COMPLAINANT'S REPLY TO RESPONDENT'S MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING FILED BY RESPONDENT—September 7, 1955

Comes now the Respondent, by its attorneys, and moves to strike the Complainant's Reply to the Respondent's Motion for an Order to Require Complainant to Produce Specified Books and Records for Examination and Copying for the following reasons:

1. The Reply is not responsive to the pending motion for an order to require the Complainant to produce, and [fol. 59] seeks a summary disposition of this proceeding contrary to the rules of practice.—

(a) The Complainant's Reply is wholly unresponsive to the Respondent's Motion for an order to produce certain books and records. The Respondent's Motion contains verified factual allegations as to the necessity of requiring the Complainant to produce certain books and records which are material to proof of certain factual issues raised by the Complaint and Answer. The factual allegations of the Respondent's motion to produce are supported by the Affidavit of Mr. L. M. Pexton, and such factual allegations have not been denied by the Complainant in its reply, or elsewhere, except in one immaterial respect*, and, ac-

* The sole instance in which the Complainant controverts the factual allegations contained in the Respondent's motion for an order to require the Complainant to produce certain books and records is with respect to the relationship between the Complainant and the Western Livestock Order Buyers. On page 3 of its Reply, the Complainant alleges that the Western Livestock Order Buyers is not a subsidiary wholly owned or otherwise by the Complainant. For the purposes of the Respondent's motion, the status of the relationship between the Complainant and the Western Livestock Order Buyers is immaterial since the latter, like the Complainant, is a registrant under the Packers and Stockyards Act of 1921, as amended (7 U.S.C.A. 181 et seq.). In any event, the Complainant's denial of the relationship is at variance with the finding of fact made in February 1955 by the Judicial Officer of the Department in a disciplinary proceeding involving the Complainant and the Western Livestock Order Buyers, as follows: "Respondent Western

cordingly, must be deemed to be admitted, for the purposes of the Res-ondent's motion.

(b) The posture of this proceeding is such that it can not be disposed of in the summary fashion requested by the Complainant on page 3 of its Reply. The Complainant asks that a ruling now be made that Item 10 (c) of the Respondent's regulations be declared invalid and of no force and effect. Complicated factual issues have been raised by the pleadings. The Respondent has requested an oral hearing on the facts, as authorized by Section 202.11 of the rules of practice (9 C.F.R. 202.11). In its pending motion for an order to require the Complainant to produce specified books and records, the Respondent has pointed out, with particularity, the competency, relevancy, and materiality of the records sought as they relate to the factual issues between the parties. Nowhere in the Reply does the Complainant deny the competency, relevancy, and materiality of the records which the Respondent seeks. Under the rules of practice, it is necessary for the Re-[fol. 60] spondent to be accorded an oral hearing on the facts, and the matter may not now be disposed of by a ruling that, as a matter of law, Item 10 (c) of the Respondent's regulation is invalid. The basic issue between the parties involves a mixed question of fact and law which, under the rules of practice, can only be determined after a full hearing on the facts, in connection with which it is essential for the Complainant to produce the records sought in the Respondent's pending motion.

2. Aside from the foregoing, in its Reply, the Complainant makes no showing why the Respondent's motion should not be granted.— Under the circumstances, it is a complete non sequitur for the Complainant, in its Reply, to take the position that the Complainant should not be required to produce the books and records requested in the Respondent's pending motion simply because the Com-

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Livestock Order Buyers is a Utah corporation wholly owned by Producers and is registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis, and as a dealer to buy and sell livestock for its own account at the stockyards . . .". (In Re Producers Livestock Marketing Association, et als. P. & S. Docket No. 2125, 14 A.D. 109).

plainant feels that Item 10 (c) of the Respondent's regulations is invalid. That, of course, is the very question to be ultimately determined in this proceeding. This issue depends upon the reasonableness of item 10 (c) of the Respondent's regulations, which relates to the conditions under which the Respondent will continue to furnish certain stockyard services at the Denver Union Stock Yards to market agencies and dealers who desire to operate at such stockyards. For all of the reasons pointed out in the Answer, it was necessary for the Respondent to issue Item 10 (c) of its regulations. The reasonableness of this item of the regulation is grounded in the facts which gave rise to its issuance. As alleged in its pending motion for an order to require the Complainant to produce certain of its books and records, the Complainant has sole custody of material evidence relating to the facts which is not otherwise available to the Respondent. Such evidence is competent, relevant, material, and indispensable to proof of the issues [fol. 61] in this proceeding as shown in the Respondent's verified motion and in the accompanying Affidavit of Mr. L. M. Pexton in support thereof. In view of the foregoing, it is obvious that, in its Reply, the Complainant simply begs the basic question at issue and seeks to avoid a factual investigation of its activities which would reveal the reasonableness of Item 10 (c) of the Respondent's regulations.

Conclusion

For the foregoing reasons, it is respectfully requested that the Complainant's Reply be stricken, and that the Respondent's pending motion for an order to require the Complainant to produce certain books and records be granted.

Respectfully submitted,

The Denver Union Stock Yard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By /s/ Ashley Sellers, Sellers & Conner

Dated: Sept. 7, 1955. Received September 7, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

STAY ORDER—September 15, 1955

The above docket was assigned to Hearing Examiner Jack W. Bain on September 12, 1955.

The letter of service of the complaint contains a statement that it has been determined that this is a disciplinary proceeding to be instituted under section 202.6 (b) of the rules of practice. The record contains no such determinations.

As the examiner must base his actions on the record alone, further proceedings herein are stayed until the record is made to show by whom and under what authority any binding determinations, decisions, or rulings have heretofore been made in this docket, and their specific terms. [fol. 62] Copies hereof shall be served upon the parties and upon the Agricultural Marketing Service.

Jack W. Bain, Hearing Examiner

September 15, 1955

BEFORE THE SECRETARY OF AGRICULTURE

MEMORANDUM FROM ASSISTANT GENERAL COUNSEL TO HEARING CLERK—September 21, 1955

To: Hearing Clerk, Office of the Secretary

From: Assistant General Counsel

Subject: Producers Livestock Marketing Association v. Denver Union Stock Yard Company, P. & S. Docket No. 2176

This will acknowledge receipt by the Agricultural Marketing Service of a copy of an order entitled "Stay Order" issued by Hearing Examination Jack W. Bain on September 15, 1955.

The Hearing Clerk of the Department was orally advised by the Office of the General Counsel of the determination referred to in the Examiner's order at the time the complaint initiating the proceeding was filed with the Hearing Clerk. The prospective parties to the proceeding were notified of the determination by letters addressed to them

by the Director of the Livestock Division, Agricultural Marketing Service, prior to the filing of the complaint with the Hearing Clerk. This has been the procedure in comparable proceedings heretofore initiated. However, in view of the Examiner's order and to insure a clear record a statement of the Director is attached hereto for filing in the record in this proceeding.

As to the authority for such determination see Federal Register, Volume 19, pages 35, 36, 74, 76, and Volume 11, pages 177A-258, 274, and Sections 202.3 and 202.6 of the rules of practice governing proceedings under the Packers and Stockyards Act.

/s/ Charles W. Bucy

By direction of the Deputy Administrator for Marketing Services, Agricultural Marketing Service

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[fol. 63] BEFORE THE SECRETARY OF AGRICULTURE

STATEMENT ATTACHED TO MEMORANDUM

As Director of the Livestock Division, Agricultural Marketing Service, and pursuant to authority and discretion theretofore vested in me, upon finding that the informal complaint made by the complainant in the above entitled proceeding could not be disposed of informally by the parties, I determined that the aggrieved party's complaint should be entertained as the moving paper initiating a proceeding under the rules applicable to disciplinary proceedings as set forth in section 202.6 et seq. of the rules of practice governing proceedings under the Packers and Stockyards Act.

The prospective parties to the proceeding were notified of the foregoing determination by mail on July 5, 1955, and thereafter the Producers Livestock Marketing Association, who filed the informal complaint, filed with the Hearing Clerk moving papers in triplicate, thus initiating the present proceeding as provided in section 202.6 of the rules of practice.

H. E. Reed, Director, Livestock Division, Agricultural Marketing Service.

Received September 21, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

NOTICE OF ARGUMENT ON MOTION—September 28, 1955

By a statement and memorandum filed herein on September 21, 1955, the record now shows the terms and authority under which this proceeding was instituted by the complainant. Accordingly, further action need be stayed no longer.

The record also contains a motion by the American Farm Bureau Federation to be allowed to intervene. Respondent has filed opposition to this motion and has requested time to file written argument on it.

It now seems to the examiner that the provision of the rules of practice referred to in the motion to intervene is not applicable to this disciplinary proceeding. However, [fol. 64] no ruling in this regard will be made until after consideration of any arguments submitted for the record. Such arguments may be filed in writing by October 12, 1955, and may be answered in writing by October 19. Other motions will be considered after the question of intervention has been decided. It is now contemplated that oral argument on other motions will be set.

Copies hereof shall be served on the parties and on counsel for the American Farm Bureau Federation.

Jack W. Bain, Hearing Examiner.

September 28, 1955.

Received September 28, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

TELEGRAPHIC WITHDRAWAL BY AMERICAN FARM BUREAU FEDERATION OF MOTION TO INTERVENE—September 30, 1955

Western
Union

1955 Sep 30 PM 6 14

—MA279
M VOW 232 PD — WV Chicago Ill 30 408PMC—
Hearing Clerk—

US Dept of Agriculture Wash DC—

In order to avoid any possibility of delay which might result from having interested parties submitting arguments on our motion to intervene in hearing on Denver Stockyards Proceeding designated packers and stockyards docket No 2176 American Farm Bureau Federation hereby withdraws said motion to intervene this action in no way indicates any change in our position regarding principles involved—

Allen A Lauterbach General Counsel—

BEFORE THE SECRETARY OF AGRICULTURE

NOTICE OF ORAL ARGUMENT ON MOTIONS—October 11, 1955

The matter of intervention in this proceeding has been settled by withdrawal of the motion for leave to intervene. It is therefore unnecessary to delay further proceedings until October 19, the end of the time allowed for filing [fol. 65] written arguments on intervention.

Oral argument on other motions and requests of record is set to begin at 10 a.m. on Friday, October 21, 1955, in Room 331-W, West Wing of the Administration Building, United States Department of Agriculture, Washington, D. C.

Jack W. Bain, Hearing Examiner.

October 11, 1955.

Received Oct. 11, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

AFFIDAVIT OF W. C. CREW IN SUPPORT OF MOTION TO REQUIRE PRODUCTION OF CERTAIN BOOKS AND RECORDS, ETC.—Filed October 21, 1955

W. C. Crew, being first duly sworn, deposes and says as follows:

My name is W. C. Crew and I am Vice President and General Manager of the Denver Union Stock Yard Company, the respondent in a proceeding instituted under the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 et seq., to inquire into the validity of Item 10 (c) of the rules and regulations issued by the respondent originally on January 27, 1955, amended effective May 25, 1955, with respect to the furnishing of stockyard services at the Denver Union Stockyards. Such proceeding was instituted upon the basis of a complaint by the Producers Livestock Marketing Association, an organization presently operating as a market agency at the Denver Union Stockyards.

This affidavit is made by me in support of a motion filed by the respondent in the above-mentioned proceeding to require the Producers Livestock Marketing Association, the complainant in such proceeding, to produce certain books and records for examination and copying by the respondent.

Affiant has personally made a preliminary search of the books and records of the Denver Union Stock Yard Company kept in the ordinary course of business, which revealed certain information concerning a large number of transactions which are pertinent to this inquiry, of which [fol. 66] the following are illustrative. The records of the Denver Union Stock Yard Company do not contain complete information on these shipments and affiant believes that the sole source of this information is the records requested in this motion, and that the information contained therein is indispensable to a complete presentation of the issues in this proceeding.

I. On September 26, 1954, a shipment of livestock was unloaded at 8:15 p.m., in the Denver Union stockyards for feed, water, and rest, and the shipment was moved into

stockyard pens for servicing. The Stockyard records disclose that the shipment was made by one Perry Holly from Hayden, Colorado, on September 25, 1954, to the Producers Livestock Marketing Association, with its destination at Chicago, Illinois. Prior to the arrival of the shipment at Denver, the destination, Chicago, Illinois, had been changed, and the shipment had been diverted to Producers Livestock Marketing Association at Eaton, Colorado, on the authority of one Bill Hilbert. The origin of this shipment was within the designated area covered by Rule 10 (c) of respondent's regulations. The shipment moved out of the Denver yard to said consignee at Eaton, Colorado, on September 27, 1954.

Affiant believes Perry Holly was not the owner of these sheep, although being shown as the shipper, and affiant further believes Perry Holly was an employee of Producers Livestock Marketing Association, acting solely on its behalf. Affiant is without knowledge or belief as to the original owner of these sheep or the name of the ultimate purchaser at Eaton, Colorado. Affiant is uninformed as to which particular office of Producers Livestock Marketing Association collected for the sheep and for whom such collection was made. It is the personal knowledge of the affiant that "Bill Hilbert" is a salesman-employee of the Producers Livestock Marketing Association at Denver, Colorado, and is the head of the sheep department of said firm at Denver, and that Mr. Hilbert would normally be contacted to execute orders for feeder sheep originating from Eaton, Colorado. Affiant is uninformed as to whether or not Mr. Hilbert received a buying commission for purchasing these sheep on behalf of an undisclosed customer; whether Mr. Hilbert had an order for feeder sheep prior to the shipping of this particular consignment; whether Mr. Hilbert had sheep on the market for sale which had been consigned to Producers [fol. 67] Livestock Marketing Association from which he could have executed this order; whether other sheep were available on the market at the time with which he could have filled the order; whether these sheep were in actual competition with sheep that had been consigned to the Producers Livestock Marketing Association at Denver, or with other sheep consigned to other commission firms for sale

on the Denver market, but affiant believes that the books and records so sought of complainant would supply such information.

II. From records of the Denver Union Stock Yard Company at Denver, Colorado, it appears that a shipment of feeder lambs was made by the Producers Livestock Marketing Association on October 9, 1954, from Wolcott, Colorado, within the designated area covered by respondent's rule, Item 10 (c), to the Producers Livestock Marketing Association, destined Chicago, Illinois. October 9, 1954, was a Saturday. The shipment was unloaded at the Denver Stockyards on October 10, 1954, and yarded into stockyard pens for feeding and servicing. On October 10, 1954, the Producers Livestock Marketing Association, since it was shown to be the owner of the livestock, was charged for the feed. On October 11, 1954, a Monday, the livestock again was fed with no change being made in the ownership. On October 12, 1954, a Tuesday, and more than 48 hours after the shipment had been unloaded for feed, water, and rest, the shipment was ordered forwarded by the Producers Livestock Marketing Association to Leo Fletcher, care of Joe Spady, at Fort Lyons, Colorado, thus showing a distinct change of consignee while the shipment was resting within the confines of the Denver Union Stockyards. Instructions were given the Denver Union Stock Yard Company to weigh the livestock, and instructions carried a notation "Diversion notice attached."

It thus appears that the livestock may have been shown to the new consignee at Denver, and that a sale may actually have been consummated at Denver. Affiant believes that the original intent of the shipment was to go to Chicago, Illinois, but by the interruption of its movement at Denver, and its ultimate diversion to a consignee other than that shown originally, it thus appears that a sales transaction occurred while the shipment was at the market. The [fol. 68] full relation between the country transaction and the market transaction can not be determined from records in possession of respondent.

III. On September 24, 1954, the Denver Union Stock Yard Company, Denver, Colorado, unloaded a shipment of

fat lambs and yarded them into pens for feeding and servicing. From the stockyard company records, affiant is informed that the shipment of lambs was made by the Producers Livestock Marketing Association on September 22, 1954, from Montrose, Colorado, an origin point within the designated area covered by respondent's regulation Item 10 (c), consigned to Producers Livestock Marketing Association with destination at Chicago, Illinois. Affiant believes that at Montrose, Colorado, the name of the shipper (Producers Livestock Marketing Association) was changed "Swift and Co.", and that the consignee formerly shown as Producers Livestock Marketing Association was changed to "Omaha Pkg. Co." It is this affiant's knowledge that the Omaha Packing Co. was at that time a subsidiary of and an unloading point at Chicago, Ill., for Swift and Company. The shipment was fed at Denver and loaded out on September 24, 1954. [This shipment was fed at Denver and loaded out on September 24, 1954.] [sic] This transaction indicates that Producers Livestock Marketing Association, as the original shipper, must have purchased sheep from a grower in the Montrose area and that on its own behalf it offered said sheep for sale at some point to Swift and Company on some condition of sale. Swift and Company are regular buyers of sheep on the market at Denver and Producers Livestock Marketing Association is a registered commission firm at Denver normally selling sheep to Swift and Company at Denver which, on many occasions, have been forwarded to said company at Chicago or at the Omaha Packing Company, Chicago. Respondent's records do now show where or when or by whom contact was made by the Producers Livestock Marketing Association with Swift and Company or whether or not said commission company was selling its own sheep to a regular market customer in competition with sheep offered through it or to others for sale at the Denver market at approximately the same time.

IV. Respondent's records indicate that on September 16, 1954, the Producers Livestock Marketing Association made [fol. 69] a shipment of sheep from DeBeque, Colorado, within the designated area covered by Respondent's Regulation 10 (c), to Producers Livestock Marketing Associa-

tion, with designation, Chicago, Illinois. From respondent's records, affiant has knowledge that, on September 17, 1954, the shipment of sheep was unloaded at the Denver Union Stock Yard Company and yarded into pens for feeding and servicing. While the shipment was at rest in the Denver Union Yards and being fed for the account of Producers Livestock Marketing Association, a change in ownership occurred and the shipment was billed out to Swift and Company, Gering, Nebraska. After feeding for the second time, and on September the 18th, the shipment moved to Gering, Nebraska. Under normal conditions, shipments moving in transit stopped at Denver for feed, water, and rest would be forwarded within a 24 hour period after arrival and after the expiration of 5 hours. This shipment however, laid over at Denver an extra day, during which time this change of ownership occurred. This affiant is unable to determine from respondent's records whether or not these lambs were the property of the Producers Livestock Marketing Association, whether or not they were sold directly to Swift and Company, whether or not the transaction occurred after showing the lambs at Denver, or any other circumstances surrounding the sale. It is affiant's belief that the records of the Producers Livestock Marketing Association will disclose whether or not lambs belonging to it were offered to a packer normally purchasing livestock at Denver to the exclusion of fulfillment of said order by livestock consigned to said commission firm for sale at Denver.

V. Respondent's records indicate that, on November 7, 1953, the Producers Livestock Marketing Association made a shipment of cattle from Craig, Colorado, within the designated area covered by respondent's Regulation 10 (e), consigned to Producers Livestock Marketing Association at Galesburg, Illinois. On November 8, 1953, respondent unloaded and yarded into stockyard pens for servicing this shipment of cattle. While in the stockyard, respondent noted changes had been made in the destination of these cattle, leading it to believe that, rather than being so-called country transaction from Producers Livestock Marketing Association to itself at Galesburg, Illinois, the shipment was consolidated with other cattle belonging to said firm

[fol. 70] at Denver for sale. It was and is affiant's belief that trading transactions took place on these cattle while supposedly resting at the stockyard, and that Producers Livestock Marketing Association actually offered these animals for sale in competition with other cattle consigned to it for sale. Affiant is without information as to whether or not Producers Livestock Marketing Association disclosed that said cattle were its own and were being sold for its own account. Affiant further believes that this shipment may have been sold by the Producers Livestock Marketing Association to its subsidiary, the Western Livestock Order Buyers, which, in turn, may have filled an order for livestock placed with it. Complainant later admitted sales on the Denver market of 93 head of cattle of which this shipment was a part. Affiant believes that the sole source of the details surrounding this transaction is the records sought.

Closing

The affiant is informed and believes that if the information sought by respondent's motion to produce is made available, that it will reveal that, in the foregoing instances and in numerous other similar instances, the Producers Livestock Marketing Association or the Western Livestock Order Buyers have continuously engaged in the practice of diverting livestock from the Denver Union Stockyards which would normally have come to such market; that they have also dealt in livestock off the Denver Union Stockyards, either directly or indirectly through the names of their employees or otherwise, in a manner which disabled them from engaging in effective selling operations at the Denver Union Stockyards with respect to livestock consigned to them at such stockyards for handling; that they have, in other instances, used livestock in their custody at Denver on through shipments to compete with other livestock of their patrons consigned to them at the market for sale; that in still other instances, they have sold their own livestock in transit to fill orders received by them at the Denver Union Stockyards; and that, by the foregoing operations, the Producers Livestock Marketing Association and the Western Livestock Order Buyers have unduly

prejudiced the handling of livestock in commerce at the Denver Union Stockyards and have discriminated against [fol. 71] such livestock in commerce at the Denver Union Stockyards.

/s/ W. C. Crew

Sworn to and subscribed before me this 21st day of October, 1955.

/s/ Lucy P. Baglia, Notary Public, My Commission Expires April 14, 1960.

Received October 21, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

INTERIM RULING AND NOTICE OF HEARING—December 6, 1955

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.). As defined in the applicable Rules of Practice (9 CFR, Part 202), it is a "disciplinary" proceeding, as distinguished from a "rate" or "reparation" proceeding (9 CFR 202.2 (l), (m), (n)). Because it was instituted by someone other than the Agricultural Marketing Service, it must be a proceeding under section 304 or 307 of the act (9 CFR 202.6(b)).

Section 304 of the statute requires stockyard owners and market agencies to furnish reasonable stockyard services without discrimination upon reasonable request. Section 307 requires stockyard owners and market agencies to set up and observe reasonable practices and regulations in furnishing stockyard services. We find nothing in these statutory provisions which prevents respondent from doing anything not specifically authorized. These are not grants of power, denying all powers not granted. They are limitations on existing power, denying only what is specifically denied.

The question before us is whether respondent has violated either of these sections. In other words, has respondent failed to furnish reasonable stockyard services, or has it set up some unreasonable practice or regulation?

We think the question of reasonableness depends upon facts, the circumstances surrounding the action taken. So [fol. 72] it seems necessary to hear the facts. We cannot hold, as complainant asks, that respondent's regulation violates the law on its face. We must have facts to see whether the regulation, or action taken under it, is reasonable under the circumstances. If it is, we cannot find any violation warranting disciplinary action. If it is not, then we must see what disciplinary action should be taken.

As we cannot decide for complainant as a matter of law, it seems necessary to go to hearing. Under these circumstances, respondent would be entitled to the subpoena it has requested. However, we must realize, on the record before us, that complainant does not want the subpoena issued. It does not seem necessary to go through the form of issuing the subpoena, having complainant move to quash it, and going on from there. We suggest, rather, the following procedure.

Oral hearing in this proceeding is set to begin at 10 a.m. on Tuesday, January 24, 1956, in Denver, Colorado. The parties will be advised later of the location of the hearing room. When complainant has presented its evidence, respondent then may move to dismiss, renew its request for a subpoena, or take whatever other action it desires. If complainant has not then presented a case, respondent will not need a subpoena. If respondent then needs the subpoena, it is my present opinon that it will be granted, and time will be given to respondent to prepare its defense. If, of course, it should develop that respondent needs further cross examination of witnesses after obtaining data disclosed by the subpoena, witnesses may be recalled for further cross examination.

Copies hereof shall be served on the parties or their counsel of record.

Jack W. Bain, Hearing Examiner.

December 6, 1955.

Received December 6, 1955 Hearing Clerk.

[fol. 73] BEFORE THE SECRETARY OF AGRICULTURE

EXCEPTIONS OF COMPLAINANT TO INTERIM RULING AND NOTICE OF HEARING—Filed December 15, 1955

Comes now the Complainant in the above entitled case and respectfully excepts to the Interim Ruling and Notice of Hearing of the Hearing Examiner herein filed with the Hearing Clerk on December 6, 1955 and for grounds for said exceptions states that the Hearing Examiner erred in not holding that as a matter of law *that* the regulation of the Respondent challenged in this proceeding is illegal because it is not authorized by the Packers and Stockyards Act, 1921, because it is contrary to that Act and because it is in violation of the Anti-Trust Laws; and Complainant hereby respectfully reserves the right to raise and argue the foregoing contentions in later proceedings in this case.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received Dec. 15, 1956 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

COMPLAINANT'S ELECTION TO REST—Filed December 23, 1955

Comes now the complainant in the above-entitled cause and states that the challenged regulation of respondent described in paragraph 1 of the Formal Complaint filed herein is illegal and invalid upon its face as a matter of law, that this complainant elects to stand upon the illegality of said regulation, as a matter of law, and states that it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law.

Wherefore the complainant hereby rests and submits its case for final decision by the Secretary of Agriculture.

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received Dec. 23, 1955 The Hearing Clerk.

[fol. 74] BEFORE THE SECRETARY OF AGRICULTURE

RESPONDENT'S MOTION TO DISMISS—Filed December 27, 1955

Comes now the Respondent, by its attorneys, and moves that the Complaint in this proceeding be dismissed, with prejudice, because of the Complainant's failure, on the record, to sustain the burden of making a prima facie case in support of its complaint, as evidenced by its election not to offer proof of its allegations and not to proceed in accordance with the Hearing Examiner's ruling of December 6, 1955.

Respectfully submitted,

The Denver Union Stock Yard Company, By Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By Ashley Sellers, Sellers & Connor.

Dated: December 27, 1955.

Received Dec. 27, 1955, The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

CERTIFICATION BY HEARING OFFICER TO JUDICIAL OFFICER—December 28, 1955

On December 23, 1955, the complainant in this proceeding filed an election to rest without presenting evidence, and requested an early decision. The respondent filed a motion to dismiss on December 27.

The oral hearing set for January 24, 1956, now seems unnecessary, and will not be held.

The examiner does not believe that an Examiner's Report would contain any facts or reasons in addition to those known in his Interim Ruling of December 6, 1955. Therefore, pursuant to Section 202.10 (b) of the Rules of Practice, the proceeding is certified to the Judicial Officer for decision, with a recommendation that it be dismissed.

Copies hereof shall be served on the parties or their [fol. 75] counsel.

Jack W. Bain, Hearing Examiner.

December 28, 1955.

Received Dec. 28, 1955, The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

ANSWER OF COMPLAINANT TO MOTION TO DISMISS—
Filed December 29, 1955

Comes now the Complainant by its attorney in the above entitled case and states that the Complaint in this proceeding should not be dismissed, and that the allegations in said Complaint show that Complainant is entitled to bring and to maintain this proceeding; and that admissions, in the answer of the Respondent in this case and in other pleadings, papers, affidavits and statements filed or made herein by Respondent show and recognize that Complainant is entitled to bring and to maintain this proceeding.

Wherefore Complainant asks that said Motion To Dismiss be denied.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert.

Dated December 29, 1955.

Received Dec. 29, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

EXCEPTIONS BY COMPLAINANT TO RECOMMENDATION OF HEARING EXAMINER THAT THIS PROCEEDING BE DISMISSED—
Filed December 29, 1955

Comes how the Complainant to the above entitled case by its attorney and hereby excepts to the recommendation of the Hearing Examiner that this proceeding be dismissed, contained in his "Certification to Judicial Officer" filed December 28, 1955, and for grounds of said exception states that the challenged regulation of Respondent herein set forth in the first paragraph of the Complaint in this case [fol. 76] is on its face and as a matter of law illegal, is unauthorized by the Packers & Stockyards Act, 1921, is contrary thereto, is unreasonable, is unjust, is discriminatory, is in restraint of trade and contrary to law generally.

Complainant hereby requests an opportunity for full oral argument of the foregoing matters and things before

the Judicial Officer and the right to submit a brief or briefs thereon.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Dated December 29, 1955.

Received Dec. 29, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

ORDER ALLOWING BRIEFS AMICUS CURIAE—February 24, 1956

In this proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.), involving the validity of a regulation issued by the respondent, Hearing Examiner Jack W. Bain made an interim ruling on December 6, 1955, to the effect that the regulation was not invalid on its face and he scheduled oral hearing upon the complaint and answer in Denver, Colorado, January 24, 1956. On December 23, 1955, the complainant elected to rest upon its face, stated that it would not present evidence at the scheduled hearing, and submitted its case for final decision in the Department. The respondent moved to dismiss the complaint with prejudice because of the complainant's failure to sustain the burden of making a prima facie case in support of its complaint. The hearing examiner thereupon certified the proceeding to the Judicial Officer for decision with a recommendation that the complaint be dismissed. The complainant filed exceptions and requested oral argument and the right to submit briefs.

The following have applied for leave to file briefs amicus curiae: Oklahoma Live Stock Marketing Association, National Live Stock Commission Company, National Feeder [fol. 77] Service Corporation, National Live Stock Producers Association, American Farm Bureau Federation, and Charles B. Heinemann, Jr. Such applications are granted and the briefs shall be filed as soon as possible but not later than March 19, 1956. Of course the briefs shall be limited to the matters in issue, namely, whether

the contested regulation is invalid on its face and whether the complaint should be dismissed for failure of the complainant to make out a prima facie case.

The request of Charles B. Heinemann, Jr., to participate in the oral argument is denied.

Done at Washington, D.C., this 24 day of February 1956.

Secretary's File
(Signed) Thomas J. Flavin, Judicial Officer.

Received February 24, 1956.

[fol. 78] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
January 2, 1957

Before Honorable WALTER A. HUXMAN, Honorable JOHN C. PICKETT and Honorable DAVID T. LEWIS, Circuit Judges.

This cause came on to be heard on the merits and on the motion to dismiss, Hadlond P. Thomas, Esquire, appearing for petitioner, Neil Brooks, Esquire, appearing for respondents, United States of America and Ezra Taft Benson, Secretary of Agriculture, Winston S. Howard, Esquire, appearing for intervener, Denver Union Stock Yard Company.

Thereupon this cause was argued by counsel and was submitted to the court.

[fol. 79] UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5459—January Term, 1957

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture, Respondents,
DENVER UNION STOCKYARD COMPANY, Intervenor-Respondent.

ON PETITION TO REVIEW DECISION AND ORDER OF THE SECRETARY OF AGRICULTURE

OPINION—February 15, 1957

Hadlond P. Thomas (Frank Armstrong, Edward M. Garrett and Thomas & Armstrong were with him on the brief) for Petitioner.

Neil Brooks (J. Stephen Doyle, Jr. and Donald A. Campbell were with him on the brief) for Respondents United States and Secretary of Agriculture.

[fol. 80] Winston S. Howard (Dawson, Nagel, Sherman & Howard, Ashley Sellers, Jesse E. Baskette, Cummings, Sellers Reeves & Connor were with him on the brief) for Intervenor Denver Union Stockyard Company.

Before HUXMAN, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This is a proceeding brought by petitioner under the Hobbs Act[1] seeking review of an order of the Secretary of

[1] Act of December 29, 1950, 64 Stat. 1129, 5 U.S.C.A. 1031, et seq.

Agriculture made under the Packers and Stockyards Act of 1921 (42 Stat. 159 as amended, 7 U.S.C. 1952 Ed., sec. 181, et seq.)[2] Petitioner is a "marketing agency" as defined by the Act and has its principal office at Salt Lake City.[3] The United States is named respondent pursuant to stat-
[fol. 81] ute[4] and the Secretary of Agriculture by rule of this court.[5] The Denver Union Stockyard Company is a "stockyard owner" as defined by the Act and has intervened as a party in interest upon motion, and as a matter of right.[6]

Section 307 of the Act[7] provides:

> "It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."

Under the purported authority of this section the stockyard company did on May 11, 1955, issue the following Regulation 10(c) contained in its "Tariff No. 14":

[fol. 82] "Item 10.

Interference With Operations

(a) . . .

(b) . . .

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company

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[2] All further references to congressional enactments are to the Packers and Stockyards Act of 1921, as amended, except as specifically noted.

[3] 5 U.S.C. 1033 provides: "The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any such parties has its principal office, or in the United States Court of Appeals for the District of Columbia."

[4] 5 U.S.C.A. 1034.

[5] Rule 34 (1) as revised.

[6] 5 U.S.C.A. 1038.

[7] 7 U.S.C.A. 208.

property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colo- [fol. 83] rado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence West and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

On July 7, 1955, the petitioner herein challenged the validity of the regulation by filing a complaint[8] with the Sec-

[8] The administrative proceeding instituted by the Petitioner was a disciplinary proceeding which the Secretary is authorized to conduct as a result of complaints made concerning regulations of stockyard owners (7 U.S.C.A. 211). The statute provides that "after full hearing upon a complaint" if the Secretary is of the opinion that the regulation is unjust, unreasonable, or discriminatory, he may order the stockyard owner to "cease and desist" from enforcing any such regulation (7 U.S.C.A. 211).

retary of Agriculture to which the stockyard company an-
[fol. 84] swered. The elaborations of complaint and answer need not be set forth for purposes of present inquiry except to state that the status of petitioner and intervenor are admitted together with the issuance of the regulation attacked. At the hearing set before the judicial officer of the Department of Agriculture petitioner elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law, illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon petitioner and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application; and dismissed petitioner's complaint. Aggrieved by the result and facing expulsion from the Denver yard upon violation of the regulation, petitioner seeks this review.

Being a public utility[9] the stockyard company has the inherent right to adopt regulations in regard to those [fol. 85] phases of its business which are secondary to its major functions. Certain it is that the utility may prescribe rules for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory regulations to that end.[10] Such right is not necessarily dependent upon statutory authority. But a regulation the effect of which is to govern not only the services rendered by the stockyard company but also services provided by a marketing agency and which, if disobeyed, will divorce the two, can be lawful only if issued in furtherance of the basic duty established by sec. 304 of the Act which provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request,

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[9] Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

[10] Steele v. Clinton Electric Light & Power Co., 123 Conn. 180, 193 A. 613, 112 A.L.R. 232; DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 95 A.L.R. 545; Hugh H. Hawkins v. Vermont Hydro-Electric Corp., 98 Vt. 176, 126 Atl. 517, 37 A.L.R. 1359.

without discrimination, reasonable stockyard services at such stockyard . . . "

Our inquiry is thus limited to a determination of whether or not the proposed regulation has any possible lawful application to the statutory duties imposed upon the stock-[fol. 86] yard company and the marketing agency "to furnish reasonable stockyard services." Stated more specifically: Does a stockyard company, in order to furnish reasonable stockyard services, have a right to restrict, by regulation, the diversion of the normal flow of livestock to its yard occasioned by any act of a marketing agency done within the normal marketing area of the yard?

It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a "full hearing" with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(e) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.

Although 9 C.F.R. 202.2(g) defines "hearing" to be "that part of the proceeding which involves the submission of evidence", it is fundamental to the law that the submission [fol. 87] of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. *Akron, C. & Y. Ry. Co.* v. *United States*, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done

in the instant case and constitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence.

The most casual study of Regulation 10(c) shows the intent and effect of the rule to be an attempt to safeguard what the stockyard considers its normal market. Marketing agencies are not prohibited from dealing elsewhere entirely but are denied the services of the Denver yard if they even "endeavor to secure customers (within the pro-[fol. 88] hibited geographic area) to sell or purchase elsewhere" than the Denver yards. The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing agencies to render reasonable services to its customers at *every* stockyard where they do business. If by rendering a reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another.

Although it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties and thereby lower the ability of both to render efficient service, still such argument, even if proved to be soundly based in fact, has no legal significance. The test of the validity of the regulation is not so dependent. Nor does the stockyard have the right to exclude from its yards those persons who lawfully trod upon its economic toes. The operation of a stockyard is affected with a public interest and devoted to a public use. Any properly exclusionary [fol. 89] regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by considerations of the parties which might form a valid basis of private contract. *Carnes* v. *St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N.W. 630; *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015; *Farmers' Livestock Commission Co.* v. *U. S.* (D.C.E.D. Ill.) 54 F.2d 375.

Stockyard companies are not monopolies and are in fact in active competition one with the other. The rights and duties thus occasioned must be correlated with the rights and duties of other entities recognized under the Act, and, both, finally, with the paramount public interest. An exclusionary regulation based upon diversion of business, such as we here consider, unlawfully restricts petitioner as a marketing agency and wounds the public interest. The persuasive words of the Supreme Court of Tennessee, passing upon the legality of a comparable situation, are in accord.

> "Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's [fol. 90] premises or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires . . . the defendants to do all their business with complainant . . ." *Nashville Union Stockyards* v. *Grissim*, *supra*.

The judicial officer expressed some concern as to whether he could properly consider this case absent some showing that the business done by petitioner with the stockyards was interstate commerce. Since the regulation was designed to affect all of the agents or dealers within the area, the question of petitioner's business does not arise, for whatever amounts to a constant practice and threatens to obstruct or unduly burden interstate commerce is within the regulatory power of Congress under the commerce clause, even though in a particular instance it affects only intrastate commerce. *Stafford* v. *Wallace*, *supra*, Note 9. Other contentions presented by the proponents of the regulation have been considered by us and deemed to be without merit.

We conclude that Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable rela- [fol. 91] tionship to the duties required of the stockyard company under the provision of the Packers and Stock-

yards Act. The regulation is invalid upon its face and the cause is accordingly Remanded with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c).

[fol. 92] IN UNITED STATES COURT OF APPEALS

JUDGMENT—February 15, 1957

Before Honorable WALTER A. HUXMAN, Honorable JOHN C. PICKETT and Honorable DAVID T. LEWIS, Circuit Judges.

This cause came on to be heard on the petition to review the decision and order of the Secretary of Agriculture, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c). It is further ordered that Producers Livestock Marketing Association, a corporation of Salt Lake City, Utah, petitioner, have and recover of and from Denver Union Stockyard Company, respondent, its costs herein.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

[By order of March 20, 1957, the mandate of the United States Court of Appeals was stayed for a period of thirty days from March 22, 1957, under provision of paragraph 3 of rule 28.]

[fol. 93] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES and EZRA TAFT BENSON, Secretary of Agriculture, Respondents.

DESIGNATION BY SECRETARY OF AGRICULTURE OF ADDITIONAL PORTIONS OF TRANSCRIPT TO BE CONTAINED IN REPRODUCED RECORD—Filed August 27, 1956

Ezra Taft Benson, Secretary of Agriculture of the United States, hereby designates the following portions of the transcript of the record in this case as the portions of the transcript to be contained in the reproduced record, in addition to the portions of the transcript set forth in the Petitioner's Designation of Portions of Transcript To Be Contained in Reproduced Record:

1. Letter dated July 8, 1955, from Hearing Clerk to Denver Union Stock Yard Company and Mr. Ashley Sellers;
2. Motion For Order To Require Complainant To Produce Specified Books and Records For Examination and Copying;
3. Affidavit of L. M. Pexton;

[fol. 94] 4. Reply To Motion For Order To Require Complainant To Produce Specified Books and Records For Examination And Copying Filed By Respondent;

5. Motion To Strike Complainant's Reply to Respondent's Motion For Order To Require Complainant To

Produce Specified Books and Records For Examination And Copying Filed By Respondent;

6. Stay Order dated September 15, 1955;

7. Memorandum dated September 21, 1955, from Assistant General Counsel to Hearing Clerk;

8. Statement dated September 21, 1955, by H. E. Reed, Director, Livestock Division, Agricultural Marketing Service;

9. Notice of Argument on Motion dated September 28 1955;

10. Telegram dated September 30, 1955, from Allen A. Lauterbach to Hearing Clerk;

11. Notice of Oral Argument on Motions dated October 11, 1955;

12. Affidavit of W. C. Crew, dated October 21, 1955;

13. Answer to Motion to Dismiss, dated December 29, 1955;

14. Order Allowing Briefs Amicus Curiae, dated February 24, 1956.

/s/ J. Stephen Doyle, Jr., Attorney, United States Department of Justice.

/s/ Neil Brooks, Assistant General Counsel, United States Department of Agriculture.

[fol. 94a] CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing designation were deposited on August 24, 1956, in the United States Post Office, with postage prepaid, addressed to H. P. Thomas, Esq., Thomas & Armstrong, 511 Walker Bank Building, Salt Lake City 11, Utah, and to Ashley Sellers, Esq., Cummings, Sellers, Reeves & Conner, 1625 K Street, N.W., Washington 6, D. C.

/s/ Neil Brooks, Assistant General Counsel, United States Department of Agriculture.

[fol. 95] CLERK'S CERTIFICATE TO FOREGOING PAPER (omitted in printing).

[fol. 96] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 97] SUPREME COURT OF THE UNITED STATES

No. 917, October Term, 1956

THE DENVER UNION STOCK YARD COMPANY, Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION.

ORDER ALLOWING CERTIORARI—Filed June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 981 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 98] SUPREME COURT OF THE UNITED STATES

No. 981, October Term, 1956

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION.

ORDER ALLOWING CERTIORARI—Filed June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 917 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
APR 17 1957
JOHN T. FEY, Clerk

No. [redacted] 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions and Regulations Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	21
Appendices	
Appendix A—Opinion of the Court Below	1a
Appendix B—Judgment of the Court Below	8a
Appendix C—Pertinent Provisions of the Packers and Stockyards Act of 1921, as Amended	9a
Appendix D—Regulation 10(c) of the Stock Yard Company	11a

CITATIONS

CASES:

Acker v. *United States*, 298 U.S. 426 (1936)	13
Associated Press v. *Labor Board*, 301 U.S. 103 (1937)	17
Baltimore & Ohio R. Co. v. *United States*, 277 U.S. 291 (1928)	9
Chicago Board of Trade v. *Olsen*, 262 U.S. 1 (1923)	17
Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918)	12, 14
Electric Bond and Share Company v. *Securities & Exchange Comm'n*, 303 U.S. 416 (1938)	17
Federal Communications Comm'n v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940)	20
Federal Power Commission v. *Hope Natural Gas Company*, 320 U.S. 591 (1944)	8
Federal Radio Commission v. *Nelson Bros. Company*, 289 U.S. 266 (1933)	20

Page

First National Bank v. *Beach*, 301 U.S. 435 (1937) . . 14, 17
Ford Motor Co. v. *Labor Board*, 305 U.S. 364 (1939) 20
Fort Worth Stockyards Co. v. *Brown*, 161 S.W. 2d 549 (Texas Civ. App. 1942) 17
Gray v. *Powell*, 314 U.S. 402 (1941) 13
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U.S. 88 (1913) 9
Kelley v. *Union Stockyard and Transit Company* (C.C.A. 7, 1951), 190 F. 2d 860 14
Levinson v. *Spector Motor Company*, 330 U.S. 649 (1947) 14
Louisville & Nashville R. R. Company v. *United States*, 238 U.S. 1 (1915) 8
Morgan v. *United States*, 298 U.S. 468 (1936) 9, 17
Morgan v. *United States*, 304 U.S. 1 (1938) 9, 10
National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) 13
Platt v. *Lecocq* (8 Cir. 1907), 158 Fed. 723 8
Rochester Telephone Corporation v. *United States*, 307 U.S. 125 (1939) 20
St. Joseph Stock Yards Company v. *United States*, 298 U.S. 38 (1936) 13
Securities & Exchange Comm'n v. *Central Illinois Corp.*, 338 U.S. 96 (1949) 13
Securities & Exchange Comm'n v. *Chenery Corp.*, 332 U.S. 194 (1947) 20
Shields v. *Utah Idaho Central R. Co.*, 305 U.S. 177 (1938) 9
Stafford v. *Wallace*, 258 U.S. 495 (1922) 15
Standard Oil Company v. *United States*, 283 U.S. 163 (1931) 14
Sugar Institute v. *United States*, 297 U.S. 553 (1936) 14
Swayne & Hoyt v. *United States*, 300 U.S. 297 (1937) 15
Swift & Company v. *United States*, 316 U.S. 216 (1942) 14
Swift & Company v. *United States*, 343 U.S. 373 (1952) 8, 14
Tagg Bros. & Moorehead v. *United States*, 280 U.S. 420 (1930) 13
United States v. *Brown* (D.C. W.D. Okla. 1925), 4 F. 2d 270 . . . . . 15, 18
United States v. *Morgan*, 313 U.S. 409 (1941) 13, 18

Page

United States v. *Pierce Auto Lines*, 327 U.S. 515 (1946) 18
United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) 15, 19

STATUTES:

Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. (Supp.) § 1001 *et seq.*:

§ 7 (5 U.S.C. (Supp.) § 1006) 8

Hobbs Act, 64 Stat. 1129, 5 U.S.C. (Supp.) § 1031 *et seq:* 6, 12

5 U.S.C. (Supp.) § 1032 19
5 U.S.C. (Supp.) § 1038 6
5 U.S.C. (Supp.) § 1040 2

Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* 15

Packers and Stockyards Act, 1921, 42 Stat. 159, as amended, 7 U.S.C. § 181 *et seq.*: 2, 3

§ 301(d) (7 U.S.C. § 201(d)) 11
§ 304 (7 U.S.C. § 205) 4, 5, 11
§ 307 (7 U.S.C. § 208) 4, 5, 11, 18
§ 310 (7 U.S.C. § 211) 3, 4, 7, 9, 10, 16, 20

28 U.S.C. § 1254(1) 2

REGULATIONS:

Rules of Practice under Packers and Stockyards Act:

9 C.F.R. § 202.2(g) 8
9 C.F.R. § 202.11(a) 8

MISCELLANEOUS:

15 Agri. Dec. 638 (1956) 2
10 F.R. 13769 1
11 F.R. 177A-233 1
18 F.R. 3219, 3648 1
19 F.R. 74 1

Administrative Justice and the Role of Discretion, Cooper, 47 Yale Law Journal 577-582 (1938) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner ("Stock Yard Company") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered on February 15, 1957. This judgment reversed a decision of the Judicial Officer[1] of the United States Department of Agriculture under the

[1] The Judicial Officer acted for the Secretary of Agriculture (10 F.R. 13769; 11 F.R. 177A-233; 18 F.R. 3219, 3648; 19 F.R. 74).

Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U.S.C. § 181 *et seq.*), in which the Judicial Officer held that a business regulation of the Stock Yard Company, challenged by the respondent ("Association"), is not invalid on its face as a matter of law. In its judgment, the Court below also instructed the Judicial Officer to vacate his order dismissing the Association's complaint and to enter an order requiring the Stock Yard Company to cease and desist from enforcing its regulation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is printed in Appendix A to this petition, *infra*, pp. 1a-7a, and is reported at 241 F. 2d 192.

The decision and order of the Judicial Officer of the United States Department of Agriculture are reported at 15 Agri. Dec. 638 (1956), and are printed in the record (R. 6-33).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix B., *infra*, p. 8a) was entered on February 15, 1957. The jurisdiction of this Court is invoked under 5 U.S.C. (Supp.) § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Regulation 10(c) of the Stock Yard Company requires all market agencies and dealers who engage in business upon the Stock Yard Company's property to refrain from engaging in specified activities. The following questions are presented:

(1) Did the Court below err in holding that it could assume facts not in the record and, upon such assumptions, declare the company regulation to be invalid and in violation of the statutory duty of the Stock Yard Company to prescribe just, reasonable, and non-discriminatory regulations?

(2) Did the Court below err in deciding that the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. § 211) as a condition to a finding of unreasonableness, as applied to a stockyard company regulation, did not require the party complainant to submit evidence to support its claim of unreasonableness?

(3) Did the Court below err in invading the statutory discretion of the Secretary of Agriculture by ordering the Secretary, without any factual record, to issue an order requiring the Stock Yard Company to cease and desist from enforcing its business regulation?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Pertinent provisions of the Packers and Stockyards Act (42 Stat. 159, as amended, 7 U.S.C. § 181 *et seq.*) are printed in Appendix C to this Petition, *infra*, pp. 9a-11a.

Regulation 10(c) of the Stock Yard Company is printed in Appendix D to this Petition, *infra*, pp. 11a-12a.

STATEMENT

(1) *The Administrative Proceeding.*—The Association brought this proceeding before the Secretary of Agriculture to secure a cease and desist order re-

straining the Stock Yard Company from enforcing its Regulation 10(c) against the Association. The Association is a "market agency" registered with the Secretary of Agriculture and does business on the "posted" market of the Stock Yard Company at Denver. As a market agency, the Association, acting as agent for the buyer or seller, buys and sells livestock for others on a commission basis.

The Stock Yard Company is required by the Packers and Stockyards Act to establish just, reasonable, and nondiscriminatory regulations in respect to the furnishing of stockyard services (§ 307 of the Act, 7 U.S.C. § 208). Regulation 10(c) was established by the Stock Yard Company in an endeavor to cure abuses of the fiduciary relationship by certain market agencies which tended to prevent the Stock Yard Company and the market agencies from providing reasonable stockyard services to patrons of the Denver market as required by § 304 of the Act (7 U.S.C. § 205).

The Association filed its complaint with the Secretary, contending that Regulation 10(c) is invalid and seeking an order from the Secretary under § 310 of the Act (7 U.S.C. § 211) to require the Stock Yard Company to cease and desist from enforcing its regulation (R. 40-43). The Stock Yard Company filed an answer, admitting the identity of the parties and the issuance of Regulation 10(c), denying all of the other factual allegations and legal conclusions in the complaint, setting forth affirmative defenses, and demanding a hearing on the facts and the law (R. 45-49).

After the case was assigned to a hearing examiner,[2]

[2] Administrative proceedings of this nature are conducted, in the first instance, before a hearing examiner; thereafter, the proceeding is reviewed by the Judicial Officer. See note 1, *supra*.

the Stock Yard Company applied for a subpoena *duces tecum* to examine specified books and records of the Association. The purpose of the subpoena was to secure substantiation of facts already known which showed abuses of fiduciary relationships by the Association (R. 50). The Association opposed such application, contending that no hearing on the facts was necessary, that the challenged regulation is invalid on its face as a matter of law, and that an order should forthwith be entered requiring the Stock Yard Company to cease and desist from enforcing its regulation (R. 55).

But the hearing examiner rejected these contentions (R. 71), holding that the basic question was whether the Stock Yard Company had failed to furnish "reasonable" stockyard services at the Denver stockyards as required by § 304 of the Act (7 U.S.C. § 205), or had set up some "unreasonable regulation" in respect to the furnishing of such stockyard services as prohibited by § 307 of the Act (7 U.S.C. § 208). He further held that "the question of reasonableness depends upon facts, the circumstances surrounding the action taken . . ." (R. 71).

The hearing examiner set a time and place for a hearing to receive evidence and indicated that, if the Association presented a case at the hearing by presenting evidence as to the "unreasonableness" of Regulation 10(c), the subpoena requested by the Stock Yard Company would be issued if the Stock Yard Company then needed the subpoena (R. 72).

Thereupon, the Association filed an "Election to Rest" (R. 73) by which it refused to go to a hearing on the facts or to present evidence in support of its

allegations as to the invalidity of the regulation. The hearing examiner certified the case to the Judicial Officer, recommending that the proceeding be dismissed (R. 74).

After receiving briefs from the parties and listening to oral argument devoted solely to legal questions—there being no facts before him—, the Judicial Officer held that the regulation is related to the furnishing of stockyard services at the Denver stockyard and that it is not unreasonable on its face as a matter of law (R. 6-33). He dismissed the complaint in view of the Association's election not to appear at a hearing upon the facts and present evidence in support of its charge that the regulation is "unreasonable". The Judicial Officer concluded ". . . that § 310 of the Act requires that a 'full hearing' precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. * * *" (R. 32).

(2) *The Decision of the Court of Appeals.*—The Association brought a proceeding against the United States and the Secretary of Agriculture in the United States Court of Appeals for the Tenth Circuit to secure judicial review of the decision and order of the Judicial Officer (R. 1-5) under the Hobbs Act (64 Stat. 1129, 5 U.S.C. (Supp.) § 1031 *et seq.*). The Stock Yard Company intervened as a respondent as a matter of right. 5 U.S.C. (Supp.) § 1038.

The Court of Appeals reversed the decision of the Judicial Officer, holding that the consideration of evidence was immaterial to the issue to be decided and not necessary to constitute a "full hearing" because,

as applied to hypothetical facts conjectured by the Court, the lower Court declared that the entire regulation is invalid on its face as a matter of law. That Court remanded the case to the Judicial Officer "with instructions" to "vacate the order dismissing" the Association's complaint and to "enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)."

REASONS FOR GRANTING THE WRIT

The importance of this case transcends its interest to either the Stock Yard Company or to the Association. The action of the Court below seriously interferes with the obligation of the Stock Yard Company and of more than three hundred and fifty other regulated stockyards to maintain reasonable regulations in respect to the furnishing of stockyard services. At stake, also, is the proper administration of the Packers and Stockyards Act by the Secretary of Agriculture and of other important regulatory statutes by other administrative agencies.

1. The Opinion of the Court Below Is in Direct Conflict With Prior Decisions of This Court Holding That a Full Hearing on the Facts, as Well as the Law, Is an Indispensable Prerequisite to the Issuance of an Order by the Secretary Under § 310 of the Packers and Stockyards Act.

The opinion of the Court below holding that the submission of evidence is not required to constitute a "full hearing" under § 310 of the Packers and Stockyards Act (7 U.S.C. § 211) will have far-reaching adverse consequences upon the Secretary of Agriculture who is charged with the administration of the Act and upon those business organizations subject to regulation under it.

The administrative proceeding instituted before the Secretary upon the Association's complaint was for the sole purpose of determining the reasonableness of the Stock Yard Company's Regulation 10(c) and, if unreasonable, to secure an order compelling the Stock Yard Company to cease and desist from enforcing the regulation. The Stock Yard Company, pursuant to the Rules of Practice (9 C.F.R. § 202.11(a)), requested an oral hearing on the facts (R. 49). The Rules of Practice specify that the term "hearing", under the Packers and Stockyards Act, includes that part of the proceeding which involves the submission of evidence (9 C.F.R. § 202.2(g)). In the administrative proceeding—instituted upon the complaint of the Association—the burden of proof was upon the Association. (§ 7, Administrative Procedure Act, 60 Stat. 241 (1946), as amended, 5 U.S.C. (Supp.) § 1006; *Platt* v. *Lecocq* (8 Cir., 1907), 158 Fed. 723. See, *Louisville & Nashville R. R. Company* v. *United States*, 238 U.S. 1, 11 (1915); *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 602 (1944), and *Swift & Company* v. *United States*, 343 U.S. 373, 382 (1952)).

But the Association elected not to appear at a hearing on the facts and not to present evidence in support of its charge that Regulation 10(c) is "unreasonable." The Stock Yard Company has always insisted that the Judicial Officer was without authority in law to issue an order requiring the Stock Yard Company to cease and desist from enforcing its regulation in the absence of a "full hearing" both on the relevant facts and the law. The Judicial Officer agreed, dismissing the complaint and holding that a "full hearing" on the facts and the law must precede a determination

that a regulation of a stockyard company in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory and that he would not be authorized to set aside a company regulation without evidence that it is unjust, unreasonable, or discriminatory (R. 32).

But the Court of Appeals—rejecting the conclusion of the Judicial Officer on this point—held that "evidence is immaterial to the issue" of the validity of Regulation 10(e) and that the "full hearing" provision of § 310 of the Act had been satisfied by "according the parties the right of argument" on the law.

The holding of the Court below conflicts directly with the decisions of this Court that § 310 of the Act provides, without qualification, that a cease and desist order may be issued only "after full hearing upon a complaint", and that such "hearing" involves the right to submit evidence as well as to make legal argument. *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Morgan* v. *United States*, 304 U.S. 1, 15 (1938). See, also, *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913); *Baltimore and Ohio R. Co.* v. *United States*, 277 U.S. 291, 299, 300 (1928); *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 182 (1938).

In the first *Morgan* case, this Court said (298 U.S. at page 480):

> "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. . . . The 'hearing' is the hearing of evidence and argument. * * *"

The Court below thus ignored the decisions of this Court which hold that a "full hearing" on the facts and the law, as provided by § 310 of the Act, is a "rudimentary" procedural requirement which the Congress has explicitly imposed as an indispensable prerequisite to the authority of the Secretary to act. *Morgan* v. *United States*, 304 U.S. 1, 15 (1938). By holding that, without any evidence at all, the Secretary of Agriculture may order a stockyard company to cease and desist from enforcing a properly promulgated business regulation, the Court of Appeals has denied this Stock Yard Company the right to defend its challenged regulation in the manner provided by the Congress. This will adversely affect all of the businesses regulated by the Packers and Stockyards Act, and it will also seriously interfere with the settled practice which has been followed by the Secretary in administering the Act.

2. The Regulation Must be Tested in the Light of Its "Reasonableness" Which Involves a Factual Inquiry, and the Court Below Erred in Reversing the Judicial Officer's Decision That Evidence Is Essential to Such a Test.

The Court of Appeals erred in holding, as a matter of law, that the challenged regulation "bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act", and that it was unnecessary to consider evidence on the issue as to the "reasonableness" of the regulation and of its relation to the furnishing of stockyard services at the Denver stockyard.

Under the Act, the validity of Regulation 10(c) depends upon whether it is a "just, reasonable, and nondiscriminatory" regulation in respect to the furnishing of reasonable stockyard services at the Denver

stockyard, §§ 304 and 307 of the Act (7 U.S.C. §§ 205, 208). The Stock Yard Company is required, under § 304 of the Act, only "to furnish upon reasonable request, without discrimination, reasonable stockyard services. . . ."

Regulation 10(c) imposes conditions upon which market agencies, dealers,[3] and others will continue to receive stockyard services at the Denver stockyard from the Stock Yard Company. Much of the buying and selling of livestock at the Denver stockyard is performed by market agencies, as agents on a commission basis, or by dealers. It is the position of the Stock Yard Company—set forth in its answer in the administrative proceeding (R. 45)—that, if the registered market agencies and dealers engage in the activities prohibited by Regulation 10(c), the patrons of the Denver stockyard, whose agents buy and sell their livestock at the Denver market, will not receive the reasonable stockyard services at that market to which they are entitled; and, further, that, by registering, a market agency undertakes to perform certain public and fiduciary functions for its patrons at Denver and, thereby, disenables itself from the right to engage in the conflicting and inconsistent activities proscribed by the regulation. Regulation 10(c) was designed to promote the furnishing of reasonable stockyard services at the Denver market by restraining the market agencies and dealers registered at Denver from soliciting business for markets other than Denver, from diverting livestock from the Denver

[3] No dealer has challenged the regulation. A "dealer" is any person other than a "market agency" who buys and sells livestock at a posted stockyard either on his own account or as agent or employee of another. § 301(d), 7 U.S.C. § 201(d).

market, or from engaging in other acts and practices designed to interfere with the normal movement of livestock to the Denver stockyard. The Stock Yard Company was prepared to show the evils at which this regulation was aimed.

The Judicial Officer correctly held that the challenged regulation is "* * * Certainly a regulation . . . in respect to the furnishing of stockyard services" (R. 19), since it is plainly a regulation which places limitations upon ". . . the continued rendering of stockyard services . . ." at the Denver stockyard. Further, he held that the regulation is not "unreasonable" on its face as a matter of law. The lower Court overruled the Judicial Officer on both points, concluding that the regulation " . . . bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act".

But, in this case, there was no evidence as to what stockyard services are rendered at the Denver market, as to who renders these services, as to how the services rendered at the Denver stockyard differ, if any, from similar services rendered at other regulated stockyards, or as to the effect of Regulation 10(c) on the rendition of stockyard services at the Denver market. The record before the Court below was devoid of ". . . facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable . . .", *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

The Court below, without knowing any facts about the regulated business, the evils to be cured, or the

way in which the regulation will affect the market agencies at the Denver market, determined that there could be no possible factual situation in which any part of the regulation could be lawful. But the Court of Appeals, itself, stated that the question for determination by it was whether Regulation 10(c) "... has any possible lawful application ...", and the Judicial Officer, being informed by experience of the manner in which regulated stockyards and market agencies operate, said that he was unable to hold that there was no possible factual situation in which the regulation would be reasonable.

The Court below—knowing nothing of the problems involved—also held that it was of "no legal significance", even "if proved to be soundly based in fact", that the ability of the patrons of the Denver stockyard to receive efficient stockyard services would be adversely affected if the market agencies engaged in the activities prohibited by Regulation 10(c). But, here again, the Judicial Officer held otherwise, declaring it could not be said that such facts would have no "material bearing" on the validity of Regulation 10(c). (R. 28)

The Judicial Officer's conclusions were entitled to respect, and the Court below was unwarranted in rejecting them and substituting its judgment for that of the Judicial Officer. *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, 442-445 (1930); *St. Joseph Stock Yards Company* v. *United States*, 298 U.S. 38, 51 (1936); *Acker* v. *United States*, 298 U.S. 426, 433-434 (1936); *United States* v. *Morgan*, 313 U.S. 409, 417 (1941). See *Gray* v. *Powell*, 314 U.S. 402, 411-413 (1941); *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *Securities*

& Exchange Comm'n v. *Central Illinois Corp.*, 338 U.S. 96, 127 (1949). Even the decisions of the Judicial Officer as to pure matters of law were entitled to great weight by the Court below. See, *Levinson* v. *Spector Motor Company*, 330 U.S. 649, 672 (1947).

Further, in holding that it was unnecessary to consider evidence on the issue of the "reasonableness" of the challenged regulation, the Court of Appeals ignored the decisions of this Court and of other federal courts which hold that application of a standard of "reasonableness" involves a factual inquiry and an intimate understanding of the technical problems of the industry concerned, since "reasonableness" is necessarily a condition which involves factors of relation and degree and can not be resolved except by scrutiny of all pertinent facts in each case. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Standard Oil Company* v. *United States*, 283 U.S. 163, 179 (1931); *Sugar Institute* v. *United States*, 297 U.S. 553, 600 (1936). "Unreasonableness is not made out by mere assertion. * * *", *Swift & Company* v. *United States*, 343 U.S. 373, 383 (1952). Neither may the "unreasonableness" of Regulation 10(c) be determined by application of any fixed rule of law or precise formula (Cf., *Swift & Company* v. *United States*, 316 U.S. 216, 225 (1942)), because the standard of "reasonableness" imposed by the Packers and Stockyards Act has a color and content that may vary with the different factual settings to which the standard is to be applied. Cf., *First National Bank* v. *Beach*, 301 U.S. 435, 438 (1937).

In *Kelley* v. *Union Stockyard and Transit Company* (C.C.A. 7, 1951), 190 F. 2d 860, 864, the Court of Appeals for the Seventh Circuit held that an issue as

to the alleged "unreasonableness" of action taken by a stockyard owner, in the furnishing of stockyard services, is essentially one of fact and discretion in technical matters and is "factual rather than legal". Accord, *United States* v. *Brown* (D.C. W.D. Okla., 1925), 4 F. 2d 270, 271. See also, *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956).[4]

Thus, the Court of Appeals erred in failing to apply the standard of "reasonableness" to the contested regulation in the manner provided by the Act and in overstepping the proper bounds of its function as a reviewing court. The consequences of its error will not be confined to this case, since it represents a departure from fixed principles and upsets the settled procedure by which the Packers and Stockyards Act has been administered by the Secretary.

3. The Opinion of the Court Below Conflicts With Prior Decisions of This Court Holding That a Regulation Should Not be Declared Invalid by the Courts on the Basis of Assumed or Hypothetical Facts.

The Court of Appeals committed fundamental error in holding Regulation 10(c) invalid as a matter of law on the theory that the regulation would be invalid as applied to hypothetical facts not in the record and never considered by the Judicial Officer. Thus, the Court of Appeals held that the challenged regulation "... is in immediate conflict with the requirement of Section 304

[4] In *Stafford* v. *Wallace*, 258 U.S. 495, 522, 523 (1922), this Court pointed out the close analogy between the Packers and Stockyards Act and the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*). It has uniformly been held by this Court, under the latter act, that questions as to the "reasonableness" of rates, practices, and regulations of carriers depend upon an appreciation of all the facts and circumstances in each case. *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 304 (1937).

which contemplates and imposes the duty upon marketing agencies to render reasonable stockyard services to its [sic] customers at *every* stockyard where they do business. * * *" (Emphasis by the Court). The lower Court conjectured and concluded that such a "conflict" would exist if the regulation were applied to the following factual situation assumed by it:

> "If by rendering reasonable services for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard, it is apparent that the agency can not perform its statutory duty in one regard or another."

But there was no evidence before the Court of Appeals that the Association or any of the market agencies operating at the Denver stockyard—or anyone else affected by Regulation 10(*e*)—is engaged, or has engaged, in furnishing stockyard services to different Colorado customers in the manner assumed by that Court in the foregoing hypothesis. The Court below even assumed that the stockyard services which would be rendered to the different Colorado customers, at different stockyards, could be "reasonable" in the case of both hypothetical customers. The lower Court thus indulged in an hypothesis upon an hypothesis. It ignored the circumstance that, upon the basis of a factual record, it might be properly concluded that a given market agency could not render "reasonable" stockyard services at more than one stockyard.

This Court has warned, with regard to proceedings under § 310 of the Packers and Stockyards Act, that "* * * Nothing can be treated as evidence which is not introduced as such ... Facts and circumstances

must not be considered which should not legally influence the conclusion. * * *", *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); and in *Associated Press* v. *Labor Board*, 301 U.S. 103, 132 (1937), this Court declared that "* * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." See, *Electric Bond and Share Company* v. *Securities & Exchange Comm'n*, 303 U.S. 416, 443 (1938); *Chicago Board of Trade* v. *Olson*, 262 U.S. 1, 42 (1923). Here, as in *First National Bank* v. *Beach*, 301 U.S. 435, 438 (1937), it may be said that "* * * Hypothetical situations are laid before us and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. * * *"

Moreover, because it felt that the regulation would be invalid in a single hypothetical situation with reference to a market agency, the Court of Appeals struck down the entire regulation, which applies not only to market agencies but also to dealers who have not attacked the regulation, and to situations in which regulation by stockyard owners has been held valid.[5] Thus, the effect of the action by the Court below is "... to bar all regulation by [holding] that regulation in a situation not presented would be invalid. * * *". *Associated Press* v. *Labor Board*, 301 U.S. 103, 132 (1937).

[5] For example, Regulation 10(e), *inter alia*, prohibits persons on the property of the Stock Yard Company from soliciting business for other markets or from interfering with consigned livestock received at the market. Such a prohibition has been held valid. *Fort Worth Stockyards Co.* v. *Brown*, 161 S.W. 2d 549 (Texas Civ. App. 1942).

Accentuating its error in holding Regulation 10(e) invalid as applied to the lower Court's hypothetical situation involving a market agency, the Court below made other factual assumptions devoid of evidential support and in the absence of any findings by the Judicial Officer regarding such matters. Thus, the Court held that the sole purpose of the regulation was to safeguard the economic interests of the Stock Yard Company and that the regulation "wounds the public interest". The first of these conclusions is in direct conflict with the uncontradicted allegations of the Stock Yard Company in its answer (R. 45) that the origin of the contested regulation—as well as its purpose—was embedded in the duty of the Stock Yard Company to maintain reasonable regulations in respect to the furnishing of stockyard services as required by §307 of the Act; and neither of these factual conclusions were the subject of findings by the Judicial Officer. Further, with regard to the second of these factual conclusions, this Court has held that, under the Packers and Stockyards Act "... the Secretary is the guardian of the public interest in regulating a business of public concern ...", *United States* v. *Morgan*, 313 U.S. 409, 417 (1941). Until the Secretary has found that a regulation "wounds the public interest", or is contrary to the public policy embedded in the Packers and Stockyards Act, "... the fact can not be said to exist and meantime it is not subject to judicial inquiry and proof. * * *", *United States* v. *Brown*, D.C. W.D. Okla. (1925), 4 F. 2d 270, 271. The courts are not the arbiters of the paramount public interest, because this is the business of the Secretary "made such by the very terms of the statute" (Cf., *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535, 536 (1946).

If, for no other reason, an appropriate regard for the primary jurisdiction doctrine made it improper for the Court below to assume the foregoing facts and hypothetical situations and to pass judgment upon the validity of Regulation 10(c) based on the Court's conception of such assumptions in the absence of findings by the Judicial Officer with regard to them. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956).

4. The Lower Court's Opinion Disregards Settled Principles of Administrative Law and Will Adversely Affect the Administration of the Packers and Stockyards Act and Similar Statutes.

(A) The Court of Appeals invaded the discretionary area conferred by the Congress exclusively upon the Secretary of Agriculture. The judgment of the Court below directs the Judicial Officer "... to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c)". But that Court had no authority to impose such directions upon the Judicial Officer even if he had erred in dismissing the complaint filed by the Association. The authority of the reviewing court is limited by the Hobbs Act (5 U.S.C. (Supp.) § 1032) to an order "... to enjoin, set aside, suspend (in whole or in part) or to determine the validity of" the final order of the Judicial Officer. That final order in this proceeding was the order dismissing the Association's complaint.

Had the Judicial Officer decided, even after a full hearing, that Regulation 10(c) was invalid as applied to the Association, he would have had several discretionary courses open to him. He could "determine and

prescribe what will be the just and reasonable ... regulation ... to be thereafter followed." He, at his discretion, could have issued an order that the Stock Yard Company should "cease and desist from such violation", and that order could be, again in the Judicial Officer's discretion, limited "to the extent to which the Secretary finds" that such violation "does or will exist." § 310 of the Act, 7 U.S.C. § 211. But the Court below preempted to itself all of this discretionary authority.

This Court has made it clear that, in reviewing the actions of administrative agencies for errors of law, the reviewing courts have no authority to " ... foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. * * *", *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940). If, indeed, the Judicial Officer had committed an error of law, the only appropriate judgment would have been to direct the Judicial Officer " ... to proceed within the framework of [his] own discretionary authority on the indicated correct principles. * * *." *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 136 (1939). See, *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 200-201 (1947); *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 374 (1939); and *Federal Radio Comm'n* v. *Nelson Bros. Company*, 289 U.S., 266, 278 (1933).

(B) Unless corrected, the action of the court below will also have an adverse impact upon other regulatory statutes. The standard of "reasonableness" embedded in the Packers and Stockyards Act is indicative of standards of a similar nature found in a host of other important regulatory statutes conferring discretionary

authority on administrative officials. See, *Administrative Justice and the Role of Discretion*, Cooper, 47 Yale Law Journal 577-582 (1938). Of particular concern is the fact that final orders of a number of Federal agencies are also subject to review by the courts of appeals under the same provisions of the Hobbs Act which govern review in this proceeding (5 U.S.C. (Supp.) § 1031 *et seq.*), among these being the Federal Communications Commission, the United States Maritime Commission, and the Atomic Energy Commission.

CONCLUSION

It is apparent that this case involves questions of importance to the livestock industry, to other regulated industries, and to the administration of the Packers and Stockyards Act and other regulatory statutes. The opinion and judgment of the Court below are in conflict with numerous decisions of this Court respecting the appropriate functions of courts reviewing the orders of administrative agencies, and the effect of the errors of the Court of Appeals is not isolated to this case. Accordingly, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5459—January Term, 1957

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah, *Petitioner*,

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, Secretary of Agriculture, *Respondents*,

DENVER UNION STOCKYARD COMPANY, *Intervenor-Respondent*.

On Petition to Review Decision and Order of The Secretary of Agriculture

(February 15, 1957)

Before HUXMAN, PICKETT and LEWIS, *Circuit Judges*.

LEWIS, *Circuit Judge*.

This is a proceeding brought by petitioner under the Hobbs Act[1] seeking review of an order of the Secretary of Agriculture made under the Packers and Stockyards Act of 1921 (42 Stat. 159 as amended, 7 U.S.C. 1952 Ed., sec. 181, et seq.)[2] Petitioner is a "marketing agency" as defined by the Act and has its principal office at Salt Lake City.[3] The United States is named respondent pursuant

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[1] Act of December 29, 1950, 64 Stat. 1129, 5 U.S.C.A. 1031, et seq.

[2] All further references to congressional enactments are to the Packers and Stockyards Act of 1921, as amended, except as specifically noted.

[3] 5 U.S.C. 1033 provides: "The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any such parties has its principal office, or in the United States Court of Appeals for the District of Columbia."

to statute[4] and the Secretary of Agriculture by rule of this court.[5] The Denver Union Stockyard Company is a "stockyard owner" as defined by the Act and has intervened as a party in interest upon motion, and as a matter of right.[6]

Section 307 of the Act[7] provides:

> "It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."

Under the purported authority of this section the stockyard company did on May 11, 1955, issue the following Regulation 10(c) contained in its "Tariff No. 14":

"Item 10.

Interference With Operations

(a) . . .

(b) . . .

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of

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[4] 5 U.S.C.A., 1034.

[5] Rule 34(1) as revised.

[6] 5 U.S.C.A., 1038.

[7] 7 U.S.C.A., 208.

livestock to the public market at this Stock yard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

The area lying east of the line begining with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence West and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

On July 7, 1955, the petitioner herein challenged the validity of the regulation by filing a complaint[8] with the Secretary of Agriculture to which the stockyard company answered. The elaborations of complaint and answer need not be set forth for purposes of present inquiry except to state that the status of petitioner and intervenor are admitted together with the issuance of the regulation attacked. At the hearing set before the judicial officer of the Department of Agriculture petitioner elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law,

[8] The administrative proceeding instituted by the Petitioner was a disciplinary proceeding which the Secretary is authorized to conduct as a result of complaints made concerning regulations of stockyard owners (7 U.S.C.A. 211). The statute provides that "after full hearing upon a complaint" if the Secretary is of the opinion that the regulation is unjust, unreasonable, or discriminatory, he may order the stockyard owner to "cease and desist" from enforcing any such regulation (7 U.S.C.A. 211).

illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon petitioner and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application; and dismissed petitioner's complaint. Aggrieved by the result and facing expulsion from the Denver yard upon violation of the regulation, petitioner seeks this review.

Being a public utility[9] the stockyard company has the inherent right to adopt regulations in regard to those phases of its business which are secondary to its major functions. Certain it is that the utility may prescribe rules for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory regulations to that end.[10] Such right is not necessarily dependent upon statutory authority. But a regulation the effect of which is to govern not only the services rendered by the stockyard company but also services provided by a marketing agency and which, if disobeyed, will divorce the two, can be lawful only if issued in furtherance of the basic duty established by sec. 304 of the Act which provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . . "

Our inquiry is thus limited to a determination of whether or not the proposed regulation has any possible lawful application to the statutory duties imposed upon the stock-

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[9] Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

[10] Steele v. Clinton Electric Light & Power Co., 123 Conn. 180, 193 A. 613, 112 A.L.R. 232; DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 95 A.L.R. 545; Hugh H. Hawkins v. Vermont Hydro-Electric Corp., 98 Vt. 176, 126 Atl. 517, 37 A.L.R. 1359.

yard company and the marketing agency "to furnish reasonable stockyard services." Stated more specifically: Does a stockyard company, in order to furnish reasonable stockyard services, have a right to restrict, by regulation, the diversion of the normal flow of livestock to its yard occasioned by any act of a marketing agency done within the normal marketing area of the yard?

It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a "full hearing" with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(c) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.

Although 9 C.F.R. 202.2(g) defines "hearing" to be "that part of the proceeding which involves the submission of evidence", it is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. Akron, C. & Y. Ry. Co. v. United States, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a "full hearing"

for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence.

The most casual study of Regulation 10(c) shows the intent and effect of the rule to be an attempt to safeguard what the stockyard considers its normal market. Marketing agencies are not prohibited from dealing elsewhere entirely but are denied the services of the Denver yard if they even "endeavor to secure customers (within the prohibited geographic area) to sell or purchase elsewhere" than the Denver yards. The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing agencies to render reasonable services to its customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another.

Although it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties and thereby lower the ability of both to render efficient service, still such argument, even if proved to be soundly based in fact, has no legal significance. The test of the validity of the regulation is not so dependent. Nor does the stockyard have the right to exclude from its yards those persons who lawfully trod upon its economic toes. The operation of a stockyard is affected with a public interest and devoted to a public use. Any properly exclusionary regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by consideration of the parties which might form a valid basis of private contract. Carnes v. St. Paul Union Stockyards Co., 164

Minn. 457, 205 N.W. 630; Nashville Union Stockyards v. Grissim, 153 Tenn. 225, 280 S.W. 1015; Farmers' Livestock Commission Co. v. U. S. (D.C.E.D. Ill.) 54 F. 2d 375.

Stockyard companies are not monopolies and are in fact in active competition one with the other. The rights and duties thus occasioned must be correlated with the rights and duties of other entities recognized under the Act and, both, finally, with the paramount public interest. An exclusionary regulation based upon diversion of business, such as we here consider, unlawfully restricts petitioner as a marketing agency and wounds the public interest. The persuasive words of the Supreme Court of Tennessee, passing upon the legality of a comparable situation, are in accord.

> "'Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires . . . the defendants to do all their business with complainant . . . " Nashville Union Stockyards v. Grissim, supra.

The judicial officer expressed some concern as to whether he could properly consider this case absent some showing that the business done by petitioner with the stockyards was interstate commerce. Since the regulation was designed to affect all of the agents or dealers within the area, the question of petitioner's business does not arise, for whatever amounts to a constant practice and threatens to obstruct or unduly burden interstate commerce is within the regulatory power of Congress under the commerce clause, even though in a particular instance it affects only intrastate commerce. Stafford v. Wallace, supra, Note 9. Other contentions presented by the proponents of the regulation have been considered by us and deemed to be without merit.

We conclude that Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act. The regulation is invalid upon its face and the cause is accordingly REMANDED with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c).

APPENDIX B

Judgment of the Court Below

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5459—January Term, 1957

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah, *Petitioner,*

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, Secretary of Agriculture, *Respondents,*

DENVER UNION STOCKYARD COMPANY, *Intervenor-Respondent.*

On Petition to Review Decision and Order of The Secretary of Agriculture

(February 15, 1957)

JUDGMENT

Twenty-First Day, January Term, Friday, February 15th, 1957.

Before HONORABLE WALTER A. HUXMAN, HONORABLE JOHN C. PICKETT and HONORABLE DAVID T. LEWIS, *Circuit Judges.*

This cause came on to be heard on the petition to review the decision and order of the Secretary of Agriculture, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c). It is further ordered that Producers Livestock Marketing Association, a corporation of Salt Lake City, Utah, petitioner, have and recover of and from Denver Union Stockyard Company, respondent, its costs herein.

APPENDIX C

Pertinent Provisions of the Packers and Stockyards Act of 1921, as Amended

Sec. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own ac-

count or as the employee or agent of the vendor or purchaser. (7 U.S.C. § 201.)

Sec. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act. (7 U.S.C. § 205.)

Sec. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (7 U.S.C. § 208.)

Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed. (7 U.S.C. § 211.)

APPENDIX D

Regulation 10(c) of the Stock Yard Company

"Item 10.

Interference With Operations

"(a) . . .

"(b) . . .

"(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert live stock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

"The area lying east of the line beginning with westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

"The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE DENVER UNION STOCK YARD COMPANY, *Petitioner,*

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	Page
I. The Case is of Wide Public Importance	1
II. The Question Presented for Review	4
III. Respondent's Erroneous Statement of the Case	7
IV. The Respondent's Argument	8
V. Conclusion	9

CITATIONS

CASE:

Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939) 6

STATUTES:

Hobbs Act (64 Stat. 1129, 5 U.S.C. Supp. 1031, *et seq.*) 10

Packers and Stockyards Act, 1921, as amended (42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.*) 5

§ 307, 7 U.S.C. 208 9

§ 310, 7 U.S.C. 211 9

MISCELLANEOUS:

Kansas City Stock Yards Co., Tariff Nos. 7-12, incl. 4

Producers Livestock Marketing Association v. Los Angeles Union Stock Yards Co., P. & S. Docket No. 2188 4

Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11 3

Webster's New Collegiate Dictionary, 1953 ed., p. 412 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 917

THE DENVER UNION STOCK YARD COMPANY, *Petitioner,*

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

As short reply is necessary, we believe, (1) to make clear beyond any question the wide public importance of the case, and (2) to impose precision upon the Respondent's arguments in its brief in opposition to our petition for certiorari.

I. The Case Is of Wide Public Importance

The wide public importance of the case is revealed by the Respondent's brief in the Court of Appeals although not in its brief in opposition to our petition for certiorari. In the Respondent's brief, pp. 2-3, in

the Court of Appeals, it was stated that the case is of "vast" public importance, that:

> "This case is eagerly watched by the stockyard companies and livestock industry throughout the land. * * * The answer must be given by this Court. It is of vast importance. Tradition is at stake. Undoubtedly the Supreme Court will be asked to decide in the end. The issue is dramatic. We will literally see history in the livestock industry made before our eyes."

Undeniably this case is of wide public importance. Regulations like those in the Denver market are in effect in various terminal stockyards throughout the country. The petition for certiorari by the Secretary of Agriculture in No. 981, in this litigation, refers on p. 10, fn. 3, to numerous regulations which are similar to the regulations in effect in the Denver market. The regulations in the Los Angeles market are said by the Respondent in its brief, p. 2, in the Court of Appeals to be *verbatim ac litteratim* the same as those in Denver.[1] The similarity is equally impressive with respect to the regulations in other stockyards also. For example, the Denver regulations, involved in this case, and the regulations in effect in Baltimore are as follows:

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[1] The Los Angeles regulations are quoted *in extenso* in the Secretary's petition for certiorari, pp. 10-11, fn. 3, in No. 981 in this litigation.

Denver Regulations (R. 40-41)	Baltimore Regulations[2]
"No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard."	"No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard."
The State of Colorado, with specified areas excepted, is defined as the "normal marketing area from which livestock would normally come" to the Denver market.	There is no definition of "normal marketing area" with respect to the Baltimore regulations.

From Los Angeles to Baltimore, various stockyards throughout the country have regulations identical or significantly similar to the regulations involved in this

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[2] See, Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Supp. 13, Rule 14, on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture.

case. Some of those regulations in other markets have been in effect for a long period of time. The Kansas City stockyards have had regulations in effect for more than 20 years to prohibit a market agency or other person at that stockyard from soliciting business for other markets or endeavoring "to secure customers to sell or purchase livestock elsewhere."[3]

The review of this case by the Supreme Court is plainly in the public interest. The Court of Appeals held that the Denver regulations are illegal, on their face, as a matter of law and that all evidence as to their reasonableness is, as a matter of law, irrelevant. It is likely, indeed, that the issue which is presented in this case and which has also been presented in an adjudicatory proceeding as to the validity of the Los Angeles regulations[4] will be presented likewise as to the similar regulations in many stockyards listed in the petition for certiorari, pp. 10-15, by the Secretary of Agriculture in No. 981.

II. The Question Presented for Review

The Respondent inaccurately states the question presented by our petition for certiorari.

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[3] See Kansas City Stock Yards Co., Tariff No. 7, § XII, Rule 8, and subsequent tariffs to and including Tariff 12, Rules 9 and 10. These regulations are on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture.

[4] See, *Producers Livestock Marketing Association* v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188, in the U. S. Department of Agriculture.

The Judicial Officer[5] rejected the Respondent's contention that the regulation of the Petitioner (Stock Yard Company) could be declared invalid on its face as a matter of law, holding that, without a factual hearing, he could not adjudicate the issue as to the "unreasonableness" of the regulation raised by the Respondent. The Judicial Officer thereupon dismissed the Respondent's complaint because the Respondent refused to attend and present evidence at a hearing to support its charges that the regulation is "unreasonable".

Contrary to the Respondent's repetitious assertions in its brief in opposition to our petition, the Stock Yard Company demanded a hearing both on the facts and the law at the outset of the administrative pro-

[5] The Judicial Officer is the highest official in the Department performing adjudicatory functions, pursuant to authority of the Secretary of Agriculture, under a number of important regulatory statutes including the Packers and Stockyards Act of 1921, as amended (42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.*). Under that Act, his decisions are of vital concern to over 450 public stockyards regulated under the Act and to over 5,000 market agencies and dealers, over 1900 packers, and over 1300 live poultry licensees regulated under such law. His decisions are also of critical concern to many thousands of livestock producers and shippers and have an important effect upon the prices paid by consumers for meat and poultry. The present incumbent has occupied the position of Judicial Officer since April 1942, and his decisions, published monthly in the *Agriculture Decisions* (currently comprising 16 volumes), include over 1400 decisions made in cases involving the Packers and Stockyards Act alone. His decisions, like those of other important regulatory agencies charged with the administration of statutes involving complex facts, are entitled to respect by the courts and may not be overturned if they are based on a rational foundation. In numerous cases, this and other courts have upheld decisions of the Judicial Officer.

ceeding (R. 49), never waived its right to such a hearing, and never elected, in any manner, to have the validity of its regulation tested as a matter of law without regard to the facts.

The order dismissing the Respondent's complaint was an exercise of administrative discretion (*Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 142 (1939).

The only proper question before the Court of Appeals related to the validity of the order of dismissal. But the Respondent insisted before that Court—as it does here in its brief in opposition to our petition—that the Court of Appeals should pass upon the validity of the Stock Yard Company's regulation as a matter of law, without consideration of facts, and in the absence of a finding by the Judicial Officer as to the reasonableness or unreasonableness of the regulation. The Court of Appeals did pass upon the validity of the regulation—not upon the basis of the arguments advanced by the Respondent, but upon a theory which had never been urged by the Respondent. Also that Court held that the submission of evidence is not necessary to constitute the "full hearing" required by law; that evidence as to the validity of the regulation is immaterial—no matter by whom presented—; and that, as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid. That Court also invaded the Secretary's discretion by directing the Judicial Officer as to the type of administrative order to be entered.

Therefore, the questions presented to this Court relate to whether the Court of Appeals properly performed its function as a reviewing court. The decision of that Court is in direct conflict with applicable

decisions of this Court. Also, in an astonishing manner, the Court of Appeals departed from the accepted and usual course of judicial proceedings involving the appropriate role of a court reviewing an administrative decision. In view of the numerous similar regulations throughout the nation, the wide importance and public interest of the case calls for a review by this Court.

III. Respondent's Erroneous Statement of the Case

The Respondent would like this Court to believe that it always took the position that the unreasonableness of the Stock Yard Company's regulation could be determined solely as a matter of law and without consideration of the facts. But the truth of the matter is that the Respondent took no such position in its complaint which initiated the administrative proceeding (R. 40). It was only after the time and place for a hearing on the facts had been set, and when the Respondent was faced with the imminent issuance of a subpoena *duces tecum* which would have required it to reveal its records as to its practices (R. 71), that the Respondent suddenly shifted its position. It then announced that it would refuse to attend a hearing, asserted that the regulation should immediately be declared invalid on its face as a matter of law, urged that evidence was immaterial no matter by whom presented, and submitted the case for final decision to the Secretary upon such basis (R. 73).

The Respondent would also like to have this Court believe that the Stock Yard Company agreed with the Respondent's novel method for disposal of the proceeding without a hearing. The truth of the matter is that the Stock Yard Company vigorously opposed the contention that a cease and desist order could be is-

sued in the absence of a full hearing, both on the facts and the law. The Judicial Officer agreed with the Stock Yard Company. The Court of Appeals, while recognizing the Stock Yard Company's contention, held that no factual hearing was necessary. It is manifestly an indication of desperation for the Respondent now to pretend that the Stock Yard Company ever agreed that the statutory standard of reasonableness could be applied to the regulation involved as a matter of law and without consideration of facts.

IV. The Respondent's Argument

The various arguments of the Respondent set forth on pages 9-23, inclusive, of its brief in opposition to our petition are the same arguments which were rejected by the Judicial Officer in his carefully considered decision covering over 26 pages (R. 6-33).

These same arguments were again urged by the Respondent upon the Court of Appeals, but that Court did not adopt any such arguments. Instead, that Court held that the Stock Yard Company's regulation is invalid on its face as a matter of law because the Court considered that the regulation would be invalid as applied to a hypothetical factual situation conjectured by it—a theory which the Respondent had never presented. The hypothetical facts thus conjectured by that Court were said by it to be as follows:

> "If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency can not perform its statutory duty in

one regard or another". (Our petition, Appendix, p. 6a).[6]

The Respondent now argues that the facts thus assumed by the Court of Appeals are not hypothetical facts because, the Respondent says, they are true facts, albeit outside the record. The point is, however, that no such facts—nor any of the other facts mentioned by the Respondent in its brief in opposition to our petition—are in the record.

V. Conclusion

At stake in this proceeding is the authority of the owners of the major public stockyards to carry out their statutory duty of establishing and enforcing "reasonable" regulations in respect to the furnishing of stockyard services (§ 307 of the Act, 7 U.S.C. 208). If the decision of the Court below is allowed to stand, an immediate shadow is cast over the regulations of practically all of the public stockyards in this country.

At stake, also, is the authority of the Secretary, acting through his Judicial Officer, to adjudicate disputes concerning stockyard regulations in accordance with the "full hearing" requirements of the law (§ 310 of the Act, 7 U.S.C. 211) and, otherwise, to administer the law in accordance with the discretionary authority conferred upon him. In holding that "evidence is immaterial" to the application of the statutory standard of "reasonableness" to industry regulations, the Court of Appeals has seriously interfered with the

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[6] The word "if" means "in case that; granting, allowing, or supposing that;—introducing a condition or supposition." *Webster's New Collegiate Dictionary*, 1953 ed., p. 412.

primary duty of the Secretary to enforce the law in the light of the relevant facts upon which the determination of questions of "reasonableness" must be made. The Court's decision ignores the basic premise upon which the Congress enacted the Packers and Stockyards Act in 1921—to vest in the Secretary the duty of sifting out the facts under the guidance of a statutory standard of "reasonableness".

Involved, also, are important questions (pp. 2 and 3 of our petition) relative to the proper function of reviewing courts under the Hobbs Act (64 Stat. 1129, 5 U.S.C. Supp. 1031 *et seq.*). The Court below substituted its judgment for that of the Judicial Officer in a manner clearly not compatible with its function of a reviewing court under the Hobbs Act.

Resolution of all of these issues by this Court is of great public importance and of vital concern to the livestock industry and to the Secretary in the administration of this important regulatory statute.

Accordingly, the questions presented by our petition and by that of the Secretary in Number 981 are questions of utmost importance and the respective petitions should be granted.

Respectfully submitted,

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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Statutory Provisions and Regulations Involved 2

Questions Presented 2

Statement 3

A. Prefatory 3

B. The Administrative Proceeding 7

C. The Decision of the Court of Appeals 12

Summary of Argument 14

Argument 21

I. The Court of Appeals Erred in Reversing the Decision of the Judicial Officer in Which He Held That He Could Not Find Regulation 10(c) of the Stock Yard Company Invalid on Its Face as a Matter of Law and in the Absence of Evidence of Record, Presented by the Complaining Association at a Hearing on the Facts, That the Regulation is "Unreasonable" 21

A. A "full hearing" on the facts, as well as the law, is an indispensable prerequisite to the authority of the Secretary to issue an order under § 310 of the Packers and Stockyards Act requiring the Stock Yard Company to cease and desist from enforcing its regulation herein involved 25

B. Regulation 10(c) of the Stock Yard Company must be tested under a statutory standard of "reasonableness," and the consideration of evidence of record—lacking in this case—is essential to application of such a standard .. 34

1. The Stock Yard Company is required by the Packers and Stockyards Act to issue "reasonable" regulations in respect to the

Page

furnishing of "stockyard services" and such regulations cannot be set aside unless they are "unreasonable" 35

2. The statutory standard of "reasonableness" can not be applied to the business regulation of the Stock Yard Company herein involved by any fixed rule of law or precise formula but only upon consideration of all of the relevant facts—introduced in evidence—in the light of the objectives of the Packers and Stockyards Act 44

3. Under the statutory standard, Regulation 10(c) of the Stock Yard Company may not properly be declared invalid on the basis of assumed or hypothetical facts conjectured by the Court below, and that Court erred in holding to the contrary 54

4. The Court below further erred in declaring the regulation invalid *in toto* because of the hypothetical facts which it conjectured with reference to a single situation 57

5. Primary jurisdiction rests with the Secretary—not the reviewing Court—to apply the statutory standard of "reasonableness" 59

II. The Court of Appeals Was Not Authorized to Interfere With the Discretionary Authority Conferred Exclusively by the Congress Upon the Secretary and to "Direct" the Secretary—Without Any Factual Record—to Enter a Cease and Desist Order in the Administrative Proceeding 65

Conclusion 68

Appendices:

Appendix A—Pertinent Provisions of the Packers and Stockyards Act of 1921, as amended 69

Appendix B—Regulation 10(c) of the Stock Yard Company 71

CITATIONS

Cases: Page

Acker v. United States, 298 U.S. 426 ....36, 37, 49, 52, 62
Alabama Power Company v. Fort Payne, 237 Ala. 459, 187 So. 632 30
Associated Press v. Labor Board, 301 U.S. 103 ..... 18, 19, 56, 59
Atchison T. & S. F. Ry. v. Commerce Comm'n, 335 Ill. 624, 167 N.E. 831 30
B. & O. R.R. v. United States, 277 U.S. 291 ..... 30, 42
Birmingham v. Rice Bros., 238 Ia. 410, 26 N.W. 2d 39 ..... 40, 61
Boyce Motor Lines v. United States, 342 U.S. 337 ... 47
Breakenridge v. Newark, 95 N.J. L. 436, 112 A. 857 31
Campbell v. Civil Service Commission, 290 Ill. App. 105, 8 N.E. 2d 49 30
Carnes v. St. Paul Union Stockyards Company, 175 Minn. 294, 221 N.W. 20 ..... 40, 61
Chicago Board of Trade v. Olson, 262 U.S. 1 ..... 18, 56
Chicago Board of Trade v. United States, 246 U.S. 231 ..... 17, 45, 48, 62
Chicago Junction Case, 264 U.S. 258 ..... 29, 30
Colgate Palmolive Peet Company v. United States, 321 U.S. 67 62
Denver Union Stock Yard Company v. United States, 304 U.S. 470 35
DeVries v. Sig Ellingson and Company (D. Minn.), 100 F. Supp. 781, affirmed, 199 F. 2d 677 (C.C.A. 8) 61
Electric Bond and Share Company v. Securities and Exchange Comm'n, 303 U.S. 419 ..... 18, 56
Farmers' Elevator Company v. Chicago, R. I. & P. R.R., 266 Ill. 567, 107 N.E. 841 31
Federal Communications Comm'n v. Pottsville Broadcasting Company, 309 U.S. 134 66
Federal Communications Comm'n v. RCA Communications, 348 U.S. 86 62
Federal Power Comm'n v. Hope Natural Gas Company, 320 U.S. 591 ..... 22, 46
Federal Radio Comm'n v. Nelson Bros. Company, 289 U.S. 266 ..... 20, 67
First National Bank v. Beach, 301 U.S. 435 .... 46, 47, 56
Ford Motor Company v. Labor Board, 305 U.S. 364 ..... 20, 67

Page

Fort Worth Stockyards Company v. Brown, 161 S.W. 2d 549 (Texas) 58
Georgia v. Pennsylvania R.R., 324 U.S. 439 62
Gray v. Powell, 314 U.S. 402 62
Henderson v. United States, 339 U.S. 816 21
International Harvester Company v. Industrial Comm'n, 157 Wis. 167, 147 N.W. 53 31
Interstate Commerce Commission v. Louisville and Nashville R.R., 227 U.S. 88 29
Johnson v. Johnson, 92 Montana 512, 15 P. 2d 842 .. 30
Kelly v. Union Stockyard and Transit Company (C.C.A. 7), 190 F. 2d 860 ..... 17, 19, 46, 60
Levinson v. Spector Motor Company, 330 U.S. 649 .. 62
Louisville & Nashville R.R. v. United States, 238 U.S. 1 ..... 22, 43
Los Angeles & S. L. Ry. v. Public Utilities Comm'n, 81 Utah 286, 17 P. 2d 287 30
Manufacturers Ry. v. United States, 246 U.S. 457 .. 61, 62
McLean Trucking Company v. United States, 321 U.S. 67 62
Midwest Farmers v. United States (D. Minn.), 64 F. Supp. 91 ..... 38, 53
Morgan v. United States, 304 U.S. 1 ..... 16, 27, 34
Morgan v. United States, 298 U.S. 468 ..... 16, 18, 27, 56
Nashville Union Stockyards v. Grissim, 153 Tenn. 225, 280 S.W. 1015 41
National Labor Relations Board v. Hearst Publications, 322 U.S. 111 62
Norwegian Nitrogen Products Company v. United States, 288 U.S. 294 63
Ohio Bell Telephone Company v. Comm'n, 301 U.S. 292 ..... 30, 53
Oklahoma Natural Gas Company v. Corporation Comm'n, 90 Okla. 84, 216 P. 917 31
Platt v. Lecocq (C.C.A. 8), 158 Fed. 723 ..... 22, 43
Powhatan Mining Company v. Ickes (C.C.A. 6), 118 F. 2d 105 ..... 30, 31
Rochester Telephone Corporation v. United States, 307 U.S. 125 ..... 20, 23, 67
St. Joseph Stockyards Company v. United States, 298 U.S. 38 ..... 19, 62, 63
Secretary of Agriculture v. Central Roig Refining Company, 338 U.S. 604 47

Page

Securities & Exchange Comm'n v. Central Illinois Corporation, 338 U.S. 96 62
Securities and Exchange Comm'n v. Chenery Corporation, 332 U.S. 194 ..... 20, 63, 67
Shields v. Utah Idaho Central R.R., 305 U.S. 177 ... 30
Stafford v. Wallace, 258 U.S. 495 ..... 28, 36, 37, 47, 52, 57
Standard Oil Company v. United States, 283 U.S. 163 ..... 17, 45, 62
Sugar Institute v. United States, 297 U.S. 553 .. 17, 45, 62
Swayne & Hoyt v. United States, 300 U.S. 297 47
Swift & Company v. United States, 343 U.S. 373 ... 22, 45
Swift & Company v. United States, 316 U.S. 216 ... 46
Tagg Bros. v. United States, 280 U.S. 420 .. 19, 28, 36, 38, 43, 47, 49, 52, 62
Twin City Pipe Line Company v. Harding Glass Company, 283 U.S. 353 61
United States v. Abilene & Southern Ry., 265 U.S. 274 30
United States v. American Trucking Association, 310 U.S. 534 62
United States v. Brown (D.C. Okla.), 4 F. 2d 270 19, 46, 60
United States v. Corrick, 298 U.S. 435 ..... 36, 49
United States v. DuPont and Company, 351 U.S. 377 62
United States v. Interstate Commerce Commission, 337 U.S. 426 21
United States v. Morgan, 313 U.S. 409 ..... 19, 60, 62, 63
United States v. Pierce Auto Lines, 327 U.S. 515 60
United States v. Western Pacific Ry., 352 U.S. 59 19, 46, 60
Woerth v. United States (C.C.A. 8), 231 F. 2d 822 ... 40

AGRICULTURE DECISIONS:

Bennett Commission Company, 2 Agr. Dec. 194 .... 38, 53
In Re Denver Stockyard Company, 10 Agr. Dec. 1033 36
Dougherty v. Union Stockyard and Transit Company, 13 Agr. Dec. 239 ..... 40, 46
Farmers Union Livestock Association v. St. Paul Union Stockyards Company, 12 Agr. Dec. 1026 .. 40, 46
Flynn v. Kansas City Stock Yards Company, 12 Agr. Dec. 14 ..... 40, 46
In Re Market Agencies at Sioux City Stock Yards, 9 Agr. Dec. 4 ..... 36, 50, 52

Page

Gilbert R. Smith v. Union Stock Yards Company, 9 Agr. Dec. 588 ..... 39, 40, 46, 61
In Re Tarr, Downs and Company, 8 Agr. Dec. 517 ... 40

STATUTES:

Administrative Procedure Act, 60 Stat. 241 (1946), as amended, 5 U.S.C. 1952 ed. § 1001 *et seq.*:
§ 7 (c), 5 U.S.C. 1952 ed. § 1006 (c) 22

Bituminous Coal Act (Act of April 26, 1937, 50 Stat. 72) 31

Hobbs Act, 64 Stat. 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.* 3, 12, 20, 21, 24
5 U.S.C. 1952 ed. (Supp. IV) § 1032 66
5 U.S.C. 1952 ed. § 1039(a) 66
5 U.S.C. 1952 ed. § 1040 2

Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1952 ed. § 1 *et seq.*) 28, 46
§ 15(1), 49 U.S.C. 1952 ed. § 15(1) 42

Packers and Stockyards Act, 1921, as amended, 42 Stat. 159, as amended, 7 U.S.C. 1952 ed. § 181 *et seq.* 1, 2, 4, 7, 21, 30, 31
§ 2 and §§ 401-408 (7 U.S.C. 1952 ed. §§ 181-183 and §§ 221-229) 4
§§ 201-205 (7 U.S.C. 1952 ed. §§ 191-195) 4
§ 301 (7 U.S.C. 1952 ed. § 201) 2, 69
§ 301(a) (7 U.S.C. 1952 ed. § 201(a)) 5
§ 301(b) (7 U.S.C. 1952 ed. § 201(b)) 4, 48
§ 301(c) (7 U.S.C. 1952 ed. § 201(c)) 4
§ 301(d) (7 U.S.C. 1952 ed. § 201(d)) 5
§§ 301-317 (7 U.S.C. 1952 ed. §§ 201-217(a)) 4, 42
§ 302(a) (7 U.S.C. 1952 ed. § 202(a)) 4
§ 302(b) (7 U.S.C. 1952 ed. § 202(b)) 4
§ 303 (7 U.S.C. 1952 ed. § 203) 4
§ 304 (7 U.S.C. 1952 ed. § 205) 2, 5, 8, 9, 17, 35, 44, 49, 54, 57, 69
§ 307 (7 U.S.C. 1952 ed. § 208) 2, 5, 8, 9, 17, 32, 35, 44, 56, 70
§ 310 (7 U.S.C. 1952 ed. § 211) 2, 3, 5, 11, 12, 14, 20, 24, 25, 26, 27, 30, 32, 34, 41, 42, 66, 70

Page

§ 312 (7 U.S.C. 1952 ed. § 213) 14, 16
§ 407 (7 U.S.C. 1952 ed. § 228) 6, 30, 58
§§ 501-505 (7 U.S.C. 1952 ed. §§ 218-218d) 4

28 U.S.C. 1952 ed. 1254(1) 2

REGULATIONS:

Regulations and Rules of Practice under the Packers and Stockyards Act:

9 C.F.R. § 201.1 *et seq.* 6, 7
9 C.F.R. § 201.4(a) 6, 35
9 C.F.R. § 201.61(a) 7, 40
9 C.F.R. § 201.63 ..... 7, 37, 58
9 C.F.R. § 201.79(b) 6, 39, 62
9 C.F.R. § 202.1 *et seq.* 7
9 C.F.R. § 202.2(g) 8
9 C.F.R. §§ 202.5-202.22, incl. 7
9 C.F.R. § 202.6(b) 7, 21
9 C.F.R. § 202.10(b) 10
9 C.F.R. § 202.11(a) 8, 22
9 C.F.R. § 202.11(b) 9
9 C.F.R. § 202.13 9
9 C.F.R. § 202.17 8

MISCELLANEOUS:

10 F.R. 13769 1
11 F.R. 177A-233 1
18 F.R. 3219, 3648 1
19 F.R. 74 1

Administrative Justice and the Role of Discretion, Cooper, 47 Yale Law Journal 577-582, 1938 47

Ezra Taft Benson, Secretary of Agriculture of the United States, petitioner, v. Producers Livestock Marketing Association, respondent, Supreme Court, Oct. Term 1956, No. 981 33

House Report No. 77, 67th Congress, 1st Session, pp. 10, 12 ..... 28, 41

Webster's New International Dictionary. Second Edition, 1939, p. 1238 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 77-84) is reported at 241 F. 2d 192. The decision and order of the Judicial Officer [1]

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[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to delegated authority. 10 F.R. 13769; 11 F.R. 177A-333; 18 F.R. 3219, 3648; 19 F.R. 74. The Judicial Officer exercises final authority within the Department of Agriculture with respect to adjudicatory functions of the Secretary under a number of regulatory statutes, including the Packers and Stockyards Act of 1921, as amended (42 Stat. 159, as amended, 7 U.S.C. 1952 ed.

of the United States Department of Agriculture (R. 6-33) are reported at 15 Agr. Dec. 638.

JURISDICTION

The judgment of the court below (R. 84) was entered on February 15, 1957. The petition for a writ of certiorari was filed on April 17, 1957, and was granted on June 3, 1957 (R. 87). The jurisdiction of this Court rests on 5 U.S.C. 1952 ed. § 1040 and 28 U.S.C. 1952 ed. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions principally involved, §§ 301, 304, 307, and 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201, 205, 208, and 211) are set forth in Appendix A, *infra*, pp. 69-70.

Regulation 10(c) of the petitioner ("Stock Yard Company") (R. 39, 78-79) is set forth in Appendix B, *infra*, pp. 71-72.

QUESTIONS PRESENTED

The respondent ("Association") challenged Regulation 10(c)—issued by the Stock Yard Company—by initiating an administrative proceeding under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*) before the Secretary of Agriculture. The Judicial Officer, holding that he would not be authorized to set the regulation aside in the absence of evidence that it is "unreasonable," dismissed the complaint

§ 181 *et seq.*). The decisions of the present incumbent of this position—who has been the Judicial Officer since 1942—are published monthly in the *Agriculture Decisions*, currently comprising 16 volumes and including over 1400 decisions in cases involving the Packers and Stockyards Act.

when the Association refused to present evidence at a hearing on the facts but relied on its contention that the Judicial Officer should declare the regulation invalid on its face as a matter of law. The court below reversed the decision of the Judicial Officer and directed him to enter an order in the administrative proceeding requiring the Stock Yard Company to cease and desist from enforcing its regulation. The following questions are presented:

(1) Did the court below err in holding that it could assume facts not in the record and, upon such assumptions, declare the company regulation to be invalid and in violation of the statutory duty of the Stock Yard Company to establish just, reasonable, and nondiscriminatory regulations?

(2) Did the court below err in deciding that the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) as a condition to a finding of unreasonableness, as applied to a stockyard company regulation, did not require the party complainant to submit evidence to support its claim of unreasonableness?

(3) Did the court below err in invading the statutory discretion of the Secretary of Agriculture by ordering the Secretary, without any factual record, to issue an order requiring the Stock Yard Company to cease and desist from enforcing its business regulation?

STATEMENT

A. *Prefatory.*—A proceeding was brought by the Association in the court below under the Hobbs Act (64 Stat. 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*) to secure a judicial review

of an administrative decision of the Judicial Officer, acting for the Secretary of Agriculture, made under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*).

Since 1921, the interstate marketing of livestock has been subject to regulation by the Secretary of Agriculture under Title III of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201-217a, inclusive).[2] A "stockyard" found by the Secretary to be within the definition contained in the Act (§ 302(a), 7 U.S.C. 1952 ed. § 202(a)) is "posted" by the Secretary (§ 302(b), 7 U.S.C. 1952 ed. § 202(b)); and, thereafter, no "market agency" or "dealer" may operate at the stockyard unless "registered" with the Secretary (§ 303, 7 U.S.C. 1952 ed. § 203). A "market agency" means any "person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services" (§ 301(c), 7 U.S.C. 1952 ed. § 201(c)). The statute defines the term "stockyard services" to mean "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock" (§ 301(b), 7 U.S.C. 1952 ed. § 201(b)).

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[2] Under Title III of the Act (§§ 301-317, 7 U.S.C. 1952 ed. §§ 201-217a), the Secretary regulates both rates and trade practices of the stockyards industry. Under other titles of the Act—not here involved—, the Secretary regulates packers (Title II of the Act, §§ 201-205, 7 U.S.C. 1952 ed. §§ 191-195) and live poultry dealers and handlers (Title V of the Act, §§ 501-505, 7 U.S.C. 1952 ed. §§ 218-218d). Titles I and IV of the Act (§ 2 and §§ 401-408, 7 U.S.C. 1952 ed. §§ 181-183 and §§ 221-229) contain definitions and general provisions applicable to all of the Titles of the Act.

A "dealer" means "any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser" (§ 301(d); 7 U.S.C. 1952 ed. § 201(d)). A "stockyard owner" is "any person engaged in the business of conducting or operating a stockyard" (§ 301(a), 7 U.S.C. 1952 ed. § 201(a)).

Section 304 of the Act makes it the ". . . duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . ." (7 U.S.C. 1952 ed. § 205). Section 307 makes it ". . . the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." (7 U.S.C. 1952 ed. § 208).

Section 310 of the Act provides that, "[w]henever after full hearing upon a complaint . . . the Secretary is of the opinion that any . . . regulation . . . of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary "[m]ay determine and prescribe . . . what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed," and the Secretary may, by order, require the stockyard owner or market agency to ". . . cease and desist from such violation to the extent to which the Secretary finds that it does or will exist" and to ". . . conform to and

observe the regulation and practice so prescribed" (7 U.S.C. 1952 ed. § 211).

Pursuant to his authority to issue rules and regulations to effectuate the provisions of the Packers and Stockyards Act (§ 407, 7 U.S.C. 1952 ed. § 228), the Secretary has issued general regulations relating to the posting of stockyards, the registration of market agencies and dealers, and the furnishing of facilities and services at posted public stockyards (9 CFR § 201.1 *et seq.*). In these regulations, the Secretary has made it clear that his own regulations ". . . shall not prevent the legitimate application or enforcement of any valid . . . regulation" of a stockyard owner which is ". . . not inconsistent or in conflict with" the Act and the secretarial regulations (9 CFR § 201.4(a)).

Such secretarial regulations also require registered market agencies or dealers at a "posted" stockyard to apply to the stockyard owner for the use of pens and facilities necessary in the conduct of the business of the applicant; and the stockyard owner is directed to make no assignment of such facilities to any such market agency or dealer which would, *inter alia*, ". . . impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market" (9 CFR § 201.79(b)).[3]

The secretarial regulations also provide, specifically, that no market agency shall ". . . enter into any agreement, relationship, or association . . . which might have a tendency to lessen the loyalty of the market agency

[3] The patrons of a "posted" stockyard are the persons who ship livestock to the stockyard for sale and those who purchase livestock at the stockyard.

to its consignors or impair the quality of the market agency's selling services" (9 CFR § 201.61(a)). It is further provided in the secretarial regulations that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in the course of transportation for delivery to the consignee at a posted stockyard or in a designated area" (9 CFR § 201.63).

The Secretary has also issued rules of practice relative to administrative proceedings conducted under the Packers and Stockyards Act (9 CFR § 202.1 *et seq.*), including rules of practice relative to the adjudicatory proceeding involved in the case at bar (9 CFR § 202.5 —§ 202.22, inclusive).

B. *The Administrative Proceeding.*—The Association brought an administrative proceeding under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*), challenging the validity of Regulation 10(c) of the Stock Yard Company (R. 39). In accordance with the applicable rules of practice (9 CFR § 202.6 (b)), the proceeding was conducted against the Stock Yard Company as the respondent upon the basis of the complaint filed by the Association (R. 60-61). In its complaint, the Association alleged that it is a "market agency," registered with the Secretary of Agriculture, doing business on the "posted" stockyard of the Stock Yard Company at Denver, Colorado. As a "market agency" the Association, acting as agent for the buyer or seller, alleged that it buys and sells livestock for others on a commission basis. The Association asserted that Regulation 10(c) is invalid and

prayed that the regulation be set aside and annulled (R. 42).

The Stock Yard Company filed an answer (R. 44-48), admitting the identity of the parties and the issuance of Regulation 10(c), denying all of the factual allegations and legal conclusions in the complaint, and alleging, *inter alia*, that Regulation 10(c) was established by it under § 307 of the Act (7 U.S.C. 1952 ed. § 208) in an endeavor to cure abuses of the fiduciary relationship between certain market agencies and the patrons of the Denver stockyard which tended to prevent the Stock Yard Company and the market agencies at the Denver stockyard from furnishing reasonable stockyard services to the patrons of the Denver stockyard as required by § 304 of the Act (7 U.S.C. 1952 ed. § 205). The Stock Yard Company also demanded a hearing on the facts and the law (R. 47-48).[4]

After the case was assigned to a hearing examiner,[5]

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[4] The rules of practice applicable to the administrative proceeding provide that the term "hearing" means that part of the proceeding which involves the submission of evidence (9 CFR § 202.2(g)). The rules further provide that a respondent "may request an oral hearing on the facts" by including such a request in its answer (9 CFR § 202.11(a)). Failure to request such a hearing on the facts is deemed to constitute a waiver of such a hearing and an agreement that the administrative proceeding may be decided upon the basis of a record formed under the shortened procedure provided by § 202.17 of the rules of practice (9 CFR § 202.17). As noted, the Stock Yard Company, which was the respondent in the administrative proceeding, made a timely request for a hearing on the facts in its answer.

[5] Administrative proceedings of this nature are conducted, in the first instance, before a hearing examiner; thereafter, final adjudication is made by the Judicial Officer on behalf of the Secretary of Agriculture. See note 1, *supra*.

the Stock Yard Company—in preparation for the administrative hearing on the facts—applied, under the rules of practice (9 CFR § 202.13), for a subpoena *duces tecum* to examine specified books and records of the Association (R. 48). The purpose of the subpoena was to secure substantiation of facts already known which showed abuses of fiduciary relationships by the Association (R. 50)—abuses which the Stock Yard Company contended its challenged regulation was designed to cure (R. 44-48).

The Association opposed such application for a subpoena, contending that no hearing on the facts was necessary, that the challenged regulation is invalid on its face as a matter of law, and that an order should forthwith be entered requiring the Stock Yard Company to cease and desist from enforcing its regulation (R. 54). But the hearing examiner rejected these contentions of the Association (R. 70-71), holding that the basic question in the administrative proceeding was whether the Stock Yard Company had failed to furnish "reasonable" stockyard services at the Denver stockyard as required by § 304 of the Act (7 U.S.C. 1952 ed. § 205), or had set up some "unreasonable" regulation in respect to the furnishing of such stockyard services as prohibited by § 307 of the Act (7 U.S.C. 1952 ed. § 208). He further held that, ". . . the question of reasonableness depends upon facts, the circumstances surrounding the action taken. * * *" (R. 71). Therefore, in accordance with the rules of practice (9 CFR § 202.11(b)), the hearing examiner set a time and place for a hearing to receive evidence and indicated that, after the Association had presented its evidence at the hearing as to the "unreasonableness" of Regulation 10(c), the subpoena requested by

the Stock Yard Company would then be issued if the Stock Yard Company still needed the subpoena. See Interim Ruling and Notice of Hearing (R. 70-71).

Thereupon, the Association filed an "Election to Rest" (R. 72) in which it stated that it elected ". . . to stand upon the illegality of said regulation, as a matter of law," and in which it reiterated its contention that Regulation 10(c) "is illegal and invalid upon its face." In its "Election to Rest," the Association also stated that it refused to go to a hearing on the facts or to present evidence in support of its allegations as to the invalidity of the challenged regulation. The Association stated that ". . . it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law" (R. 72). The Association concluded its "Election to Rest" by stating that it ". . . hereby rests and submits its case for final decision by the Secretary of Agriculture" (R. 72).

The respondent moved to dismiss the complaint because of the Association's refusal to proceed as required (R. 73).

Under these circumstances, the hearing examiner concluded—in accordance with the rules of practice (9 CFR § 202.10(b))—that the proceeding should be ". . . certified to the Judicial Officer for decision, with a recommendation that it be dismissed" (R. 73). In certifying the proceeding to the Judicial Officer, the hearing examiner took note of the Association's "Election to Rest" without presenting evidence, and he referred to his previous ruling to the effect that the validity of the challenged regulation of the Stock Yard Company could only be decided in the light of its "rea-

sonableness" and that ". . . the question of reasonableness depends upon facts, the circumstances surrounding the action taken. * * *" (R. 71).

The Judicial Officer received briefs and listened to legal argument devoted solely to the legal issues raised before him: *viz.*, the Association's contention that the regulation should be declared invalid on its face as a matter of law without the consideration of evidence developed at a factual hearing and the Stock Yard Company's contention that the Judicial Officer would not be authorized to do so. The Judicial Officer decided that, upon the limited record before him—devoid of facts—he could not find that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law (R. 6-33). He stated that, in the administrative proceeding under the Packers and Stockyards Act, he would not be authorized to set the business regulation of the Stock Yard Company aside without evidence that it is "unreasonable" (R. 32). He dismissed the complaint in view of the Association's election not to appear at a hearing upon the facts and present evidence in support of its charge that the regulation is 'unreasonable." The Judicial Officer also stated ". . . that section 310 of the act requires that a 'full hearing' precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. * * *" (R. 32). In his decision, the Judicial Officer stated plainly that, upon the limited record before him, he was not making any finding as to the "reasonableness" or "unreasonableness" of Regulation 10(c), since there were no facts in the record upon which such a determination could properly be made.

but that he was simply deciding that the regulation could not be declared invalid on its face as a matter of law (R. 16).

C. *The Decision of the Court of Appeals.*—The Association then filed a petition in the United States Court of Appeals for the Tenth Circuit, seeking a judicial review under the Hobbs Act (64 Stat. 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*) of the decision and order of the Judicial Officer. The United States and the Secretary of Agriculture were named respondents in the court below (R. 1), and the Stock Yard Company intervened as a respondent in the Court of Appeals as a matter of right (R. 33-34).

The Court of Appeals—without any record of evidence before it—reversed the decision of the Judicial Officer, declaring that the regulation of the Stock Yard Company is invalid upon its face as a matter of law (R. 77-84). In reaching this conclusion, the court below held that the "full hearing" provision of § 310 of the Act (7 U.S.C. 1952 ed. § 211) did not require either the court or the Secretary to consider evidence but that the provision had been satisfied by "according the parties the right of argument" as to the law (R. 81-82). The lower court also held that all evidence as to the challenged regulation is immaterial—no matter by whom presented (R. 81). In the view of the lower court, Regulation 10(c) of the Stock Yard Company ". . . is in immediate conflict with the requirement of Sec. 304 [7 U.S.C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing [*sic*] agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business" (Emphasis supplied by lower court) (R. 82). The lower court

held that such a conflict would exist as applied to the following factual situation conjectured by it:

> "If by rendering reasonable services for a Colorado customer at one stockyard a marketing [*sic*] agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency can not perform its statutory duty in one regard or another" (R. 82).

The lower court further declared—contrary to the decision of the Judicial Officer—that it was of "no legal significance" if the ability of both the Stock Yard Company and the market agencies at the Denver stockyard to render efficient stockyard services to the patrons of the Denver stockyard would be impaired in the absence of Regulation 10(c) (R. 82). Further, although the Judicial Officer had made no such findings in view of the Association's election not to attend a hearing on the facts, the court below decided (1) that the sole purpose of the challenged regulation was to protect the economic interests of the Stock Yard Company (R. 82) and (2) that the challenged regulation "wounds the public interest" (R. 83). Accordingly, the lower court concluded ". . . that Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of [the Association] and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision [*sic*] of the Packers and Stockyards Act" (R. 83-84). The court below then remanded the case to the Judicial Officer, with instructions, "to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)" (R. 84).

SUMMARY OF ARGUMENT

I.

The Stock Yard Company submits that the Court of Appeals did not properly perform its function as a court charged with the duty of reviewing administrative action. The only proper question before the court below related to the validity of the order of the Judicial Officer in the administrative proceeding which dismissed the complaint when the Association refused to appear at a hearing and present evidence in support of its charge that the regulation of the Stock Yard Company is "unreasonable."

The Judicial Officer correctly concluded that, in view of the regulatory scheme contemplated by the Packers and Stockyards Act—providing, *inter alia*, that the Secretary may set aside a business regulation of a stockyard company only after a "full hearing" (§310, 7 U.S.C. 1952 ed. § 211)[6]—, he would not be authorized to require the Stock Yard Company, in the administrative proceeding, to cease and desist from enforcing its regulation in the absence of evidence that the regulation is "unreasonable" (R. 33).

The court below committed fundamental error—requiring reversal by this Court—in holding that the "full hearing" provision of § 310 of the Act did not require either the reviewing court or the Judicial Officer to consider evidence and that the hearing require-

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[6] Section 312 of the Act likewise makes a "full hearing" a prerequisite to the issuance of a cease and desist order by the Secretary relative to unfair, unjustly discriminatory, or deceptive practices or devices of a stockyard owner, market agency, or dealer in connection with the handling of livestock (7 U.S.C. 1952 ed. § 213).

ment had been satisfied by according the parties the right of argument on the sole legal issue sought to be raised by the Association (R. 81-82); that all evidence as to the purpose, operation, and effect of Regulation 10(c) of the Stock Yard Company was immaterial to the issue of the "reasonableness" of the regulation (R. 81); and that, as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid (R. 82).

(A) A threshold issue—dispositive of the case—arises from the circumstance that, admittedly, no factual hearing was held because the Association, which was the complainant in the administrative proceeding, refused to attend such a hearing and present evidence, contending, instead, that the Judicial Officer should, without a factual hearing, set aside the regulation of the Stock Yard Company (R. 72). But at the outset of the administrative proceeding, the Stock Yard Company demanded a hearing on the facts and the law (R. 47-48), never waived its right to such a hearing, and never elected, in any manner, to have the validity of its regulation decided as a matter of law without regard to the facts. The Judicial Officer properly upheld the contention of the Stock Yard Company that the cease and desist order sought by the Association could not be issued in the absence of a "full hearing" both on the facts and the law (R. 32). This is not a case in which the administrative agency refused to hold a hearing on the facts or attempted to impose a sanction in the absence of a hearing. In the administrative proceeding, a time and place for a hearing on the Association's complaint was set (R. 71). But the Association refused to appear, contending that such a hearing was unnecessary and stating that it elected to

stake the outcome of the proceeding on its contention that the regulation is invalid on its face as a matter of law (R. 72).

By holding ". . . that the submission of evidence is not required to characterize a 'full hearing' " and that the "full hearing" requirement of § 310 of the Act (7 U.S.C. 1952 ed. § 211) had been satisfied by "according the parties the right of argument" on the law (R. 81-82), the lower court ignored prior decisions of this Court. These include decisions holding that § 310 of the Packers and Stockyards Act requires a hearing both on the law and the facts. *Morgan* v. *United States*, 304 U.S. 1, 15; *Morgan* v. *United States*, 298 U.S. 468, 480. As pointed out by the Judicial Officer (R. 28), critical factual issues were raised by the complaint and the answer. When the Association refused to attend a factual hearing and present evidence in support of its charges, the Judicial Officer was clearly warranted in dismissing the Association's complaint.

If allowed to stand, the decision of the court below, holding that a hearing on the facts is unnecessary in cases of this type, will have far-reaching adverse consequences both on the Secretary who is charged with the administration of the Act and on the more than 500 stockyards subject to regulation under it.

(B) The court below also erred by holding, as a matter of law, that evidence was "immaterial to the issue to be decided" because, in that court's opinion, it was unnecessary to consider evidence on the issue as to the "reasonableness" or "unreasonableness" of the regulation and as to the furnishing of stockyard services at the Denver stockyard (R. 81).

(1) The statutory standard under the Packers and Stockyards Act by which the regulation must be tested relates to whether it is a "reasonable" regulation in respect to the furnishing of "reasonable" stockyard services (§§ 304, 307, 7 U.S.C. 1952 ed. §§ 205, 208). The Stock Yard Company is required to issue such regulations. The regulation may be set aside only if it is "unreasonable" (§ 310, 7 U.S.C. 1952 ed. § 211). The consideration by the Secretary of evidence as to the essential facts of the industry is the pivotal circumstance upon which the whole administrative process for regulating the stockyards industry depends. This is the reason why the Congress resorted to the administrative process in the first place.

(2) Application of the statutory standard of "reasonableness" to the challenged regulation thus involves a factual inquiry and an intimate understanding of the technical problems of the stockyards industry, since questions of "reasonableness" can not be resolved by any fixed rule of law or precise formula but only upon consideration of all the pertinent facts in each case in the light of the objectives of the Packers and Stockyards Act. *Sugar Institute* v. *United States*, 297 U.S. 553, 600; *Standard Oil Company* v. *United States*, 283 U.S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238; *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864. Consideration must be given, *inter alia*, to evidence as to the type of "stockyard services" furnished at the particular stockyard; to who furnishes the different kinds of services available; to the effect of the challenged regulation upon the furnishing of such "stockyard services"; and to other pertinent facts of a complex nature.

The record here is barren of all evidence, and it was error for the lower court to reject the Judicial Officer's decision that the statutory standard requires the consideration of evidence as to the facts and that the validity or invalidity of the challenged regulation cannot be determined solely as a matter of law.

(3) Appropriate regard for the statutory standard of "reasonableness"—and the primary responsibility of the Secretary—made it highly improper for the Court of Appeals to declare the challenged regulation invalid on its face as a matter of law on the theory that the regulation would be invalid, in the lower court's view, as applied to hypothetical facts conjectured by it and never considered by the Secretary. But that is exactly what the lower court did. It conjectured a hypothetical situation, held that the Stock Yard Company's regulation would be invalid as applied to such conjectured facts, and found that the regulation "wounds the public interest." In so doing, the court below ignored the repeated admonitions of this Court that nothing should be treated as evidence which is not in the record and that courts should deal with cases upon the basis of the facts of record and never with non-existent, assumed, or fanciful circumstances. *Electric Bond and Share Company* v. *Securities and Exchange Comm'n*, 303 U.S. 419, 443; *Associated Press* v. *Labor Board*, 301 U.S. 103, 132; *Morgan* v. *United States*, 298 U.S. 468, 480; *Chicago Board of Trade* v. *Olson*, 262 U.S. 1, 42.

(4) The lower court compounded its error by striking down the challenged regulation *in toto* merely because, in that court's view, the regulation would be invalid as a matter of law as applied to a "market agency" in a single conjectured situation. Yet the

regulation also applies to "dealers" who have not attacked the regulation and to situations in which regulation by the Secretary and stockyard owners has uniformly been upheld for years. Thus, the court below has barred all regulation by erroneously holding that regulation in a situation not shown to exist would be invalid. This Court has declared that this may not be done. *Associated Press* v. *Labor Board*, 301 U.S. 103, 132.

(5) Under the regulatory scheme of the Packers and Stockyards Act, primary jurisdiction lay with the Secretary—not the reviewing court—to apply the statutory standard of "reasonableness"; and the lower court was clearly unwarranted in substituting its judgment for that of the responsible administrative official by holding that it was unnecessary either for the Judicial Officer or for the court to consider evidence on the issue as to the "reasonableness" of the regulation. *United States* v. *Morgan*, 313 U.S. 409, 417; *St. Joseph Stockyards Company* v. *United States*, 298 U.S. 38, 51; *Tagg Bros. v. United States*, 280 U.S. 420, 442-445. *A fortiori*, this is true where, as here, the responsible administrative official had never considered the conjectured facts upon which the lower court based its judgment. *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D.C. Okla.), 4 F. 2d 270, 271. See, also, *United States* v. *Western Pacific Ry.*, 352 U.S. 59.

II.

By directing the Judicial Officer, without any factual record, to reopen the administrative proceeding and to enter a cease and desist order, the Court of Appeals also wrongfully interfered with the discre-

tionary authority conferred exclusively by the Congress upon the Secretary. The function of the court below was strictly limited, by the Hobbs Act, to determining whether the Judicial Officer was warranted in dismissing the complaint of the Association in the administrative proceeding when the Association refused to go to a factual hearing. 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.* Under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211), the Secretary has discretion as to how to proceed if it is determined that a regulation is "unreasonable." But the lower court not only wrongfully declared the challenged regulation of the Stock Yard Company invalid on its face as a matter of law, but it also preempted to itself all of the discretionary authority thus conferred upon the Secretary. Even if the Judicial Officer had erred, the function of the court below was limited to a consideration of any such errors and, under no circumstances, did the court below have authority to direct the Judicial Officer how to proceed within the discretionary framework of his authority. This Court has repeatedly made this point clear. *Securities and Exchange Comm'n* v. *Chenery Corporation*, 332 U.S. 194, 200-201; *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 136; *Ford Motor Company* v. *Labor Board*, 305 U.S. 364, 375; *Federal Radio Comm'n* v. *Nelson Bros. Company*, 289 U.S. 266, 278.

If allowed to stand, the effect of the decision of the court below will be to prevent the Secretary from exercising his continuing administrative responsibility under the Packers and Stockyards Act, for the meaning of that decision is clear, *viz.*, Regulation 10(e) and all similar regulations are invalid on their face as a matter of law, and the Secretary is not warranted in

holding factual hearings, either on complaint or upon his own initiative, to inquire into the reasonableness of such regulations and to prescribe appropriate remedies if they are found to be "unreasonable." Plainly, such a result would be destructive of the whole administrative process, and the judgment below must be reversed.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE JUDICIAL OFFICER IN WHICH HE HELD THAT HE COULD NOT FIND REGULATION 10(C) OF THE STOCK YARD COMPANY INVALID ON ITS FACE AS A MATTER OF LAW AND IN THE ABSENCE OF EVIDENCE OF RECORD, PRESENTED BY THE COMPLAINING ASSOCIATION AT A HEARING ON THE FACTS, THAT THE REGULATION IS "UNREASONABLE."

The only question properly before the court below related to the validity of the order of the Judicial Officer dismissing the Association's complaint. 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.* Under the rules of practice governing the administrative proceeding (9 CFR § 202.6(b)), the Association was the complainant (R. 39, 60-61). (*Cf., Henderson* v. *United States*, 339 U.S. 816, 818-823; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 428-429, 432-434).

The sole purpose of the Association in bringing the administrative proceeding was to secure an order from the Judicial Officer to determine whether Regulation 10(c) of the Stock Yard Company is "unreasonable" within the meaning of that standard as used in the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 1952 ed. § 181 *et seq.*), and, if "unreasonable," to secure an order compelling the Stock Yard Company to cease and desist from enforcing the regulation.

The Stock Yard Company, pursuant to the rules of practice (9 CFR § 202.11(a)), requested an oral hearing on the facts (R. 47-48). In the administrative proceeding, the burden of proof was upon the Association to establish that the regulation is "unreasonable" in fact. Section 7(c), Administrative Procedure Act, 60 Stat. 241, as amended, 5 U.S.C. 1952 ed. § 1006(c); *Platt* v. *Lecocq* (C.C.A. 8), 158 Fed. 723, 728. See, *Swift and Company* v. *United States*, 343 U.S. 373, 382; *Federal Power Comm'n* v. *Hope Natural Gas Company*, 320 U.S. 591, 602, and *Louisville and Nashville R.R.* v. *United States*, 238 U.S. 1, 11.

But after the Hearing Examiner indicated that he was prepared to issue a subpoena *duces tecum* requiring the Association to produce certain of its books and records for use by the Stock Yard Company at a hearing on the facts (R. 70-71), the Association promptly announced that it would refuse to appear at such a hearing and to offer evidence in support of its allegations as to the "unreasonableness" of the regulation of the Stock Yard Company (R. 72). Instead, the Association requested an immediate ruling by the Secretary—acting through the Judicial Officer—that Regulation 10(c) is invalid on its face as a matter of law (R. 72). In taking this position, the Association contended that evidence as to the "reasonableness" or "unreasonableness" of the regulation is immaterial—no matter by whom presented.

The Judicial Officer rejected the Association's contention that the regulation of the Stock Yard Company could be declared invalid on its face as a matter of law, holding that, without a factual hearing, he could not determine the validity of Regulation 10(c) and, further, that he would not be authorized to do so (R. 32). The Judicial Officer dismissed the Association's com-

plaint in view of the Association's election not to attend and to present evidence at a hearing on the facts in support of its complaint (R. 32-33).

The Judicial Officer had no authority, in the administrative proceeding, to require the Association to rely on any position other than the position which the Association took. Since the Judicial Officer concluded that he could not uphold the Association's novel contention, he properly exercised his discretion under the Packers and Stockyards Act by dismissing the complaint.[7] In the particular administrative proceeding involved herein, the Judicial Officer was concerned only with the proper disposition of the complaint of the Association when he concluded that he could not agree with the Association's argument that he should declare Regulation 10(*c*) invalid as a matter of law without any factual hearing and in the absence of any evidence showing that it is "unreasonable." Dismissal of the Association's complaint by the Judicial Officer did not, of course, thereafter foreclose the Secretary from taking any proper action—either on his own initiative or upon a proper complaint of another person—with regard to Regulation 10(*c*) of the Stock Yard Company or similar regulations of other stockyard companies, if he were to deem such action appropriate. But the action of the Court of Appeals in ordering the Secretary to reopen this particular administrative proceeding and—without any hearing on the pertinent facts—to issue a cease and desist order against the Stock Yard Company has effectively foreclosed the

[7] An order dismissing a complaint in an administrative proceeding is an exercise of administrative discretion no less than would be an order requiring affirmative action. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 142.

Secretary from exercising his administrative responsibilities with regard to Regulation 10(c) and similar regulations at other stockyards.

Notwithstanding that the only question properly before the lower court related to the validity of the order of the Judicial Officer dismissing the Association's complaint, that court ignored its sole proper function and substituted its judgment for that of the Judicial Officer by deciding that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law. The court below further held that the submission of evidence is not necessary to constitute the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) and that such "full hearing" provision of the law had been satisfied in the administrative proceeding by "according the parties the right of argument" on the law (R. 81-82). The lower court also held that evidence as to the purpose, operation, and effect of the challenged regulation—no matter by whom presented—is immaterial (R. 81); and that as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid.[8]

As will appear in the following parts of this argument, the opinion and judgment of the Court of Appeals is in conflict with prior decisions of this Court; and, moreover, the lower court departed from the accepted and usual course of judicial proceedings involv-

[8] The Court of Appeals reached these conclusions in spite of the fact that, under the terms of the Hobbs Act, in reviewing the Judicial Officer's action in dismissing the Association's complaint, the reviewing court was confined to a consideration of the record in the administrative proceeding (5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*

ing the review of administrative action under important regulatory statutes such as the Packers and Stockyards Act.

Only by a reversal by this Court of the opinion and judgment of the lower court will the Stock Yard Company—and all other stockyard companies regulated under the Packers and Stockyards Act—be accorded the procedural safeguards imposed by the Congress with respect to the regulation of their activities and will the Secretary of Agriculture be able to administer this important regulatory statute in the manner contemplated by the Congress.

A.

A "Full Hearing" on the Facts, as Well as the Law, Is An Indispensable Prerequisite to the Authority of the Secretary to Issue An Order Under § 310 of the Packers and Stockyards Act Requiring the Stock Yard Company to Cease and Desist from Enforcing Its Regulation Herein Involved.

A threshold error—requiring reversal by this Court for this reason alone—was made by the Court of Appeals in holding that the "submission of evidence is not required" to constitute a "full hearing" under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) and that the "full hearing" requirement had been satisfied here by "according the parties the right of argument" merely on legal issues (R. 81-82).

Section 310 of the Act provides that the Secretary may take certain prescribed action—

> "Whenever after full hearing upon a complaint . . ., the Secretary is of the opinion that any . . . regulation . . . of a stockyard owner . . ., for or in connection with the furnishing of stockyard serv-

ices, is or will be unjust, unreasonable, or discriminatory. . . ."

In holding that the "full hearing" provision of § 310 of the Act had been satisfied by "according the parties the right of argument" on the law (R. 81), the lower court also decided that "evidence is immaterial to the issue to be decided"[9] (R. 81).

It is the position of the Stock Yard Company that the Judicial Officer properly held that § 310 of the Act requires that a "full hearing" both on the facts and the law must precede a determination by the Secretary that a regulation of a stockyard company "for or in connection with the furnishing of stockyard services is unjust, unreasonable or discriminatory" (R. 32).

In view of the positive statutory requirement and of the crucial factual issues made by the pleadings in the administrative proceeding (R. 28), the Judicial Officer correctly concluded that he would not be authorized to set Regulation 10(c) aside without evidence that it is unjust, unreasonable, or discriminatory.

In holding otherwise, the opinion of the court below conflicts with prior decisions of this Court that § 310 of the Act provides, without qualification, that a cease and desist order may be issued only after full hearing upon a complaint and that such hearing involves the right to submit evidence, as well as to make legal argument.

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[9] The error of the lower court in holding that "evidence is immaterial to the issue to be decided" is discussed in this argument, *infra*, pp. 34-65, where it is shown that the statutory standard of "reasonableness"—by which Regulation 10(c) must be tested—requires a full consideration of facts by the Secretary since such a standard cannot be applied by any fixed rule of law or precise formula.

In *Morgan* v. *United States*, 298 U.S. 468, this Court said, at page 477,

> "* * * If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied. * * *."

Further, in discussing the authority conferred upon the Secretary by §310 of the Act, this Court stated that the Secretary must comply with fundamental procedural requirements. At page 480, this Court said:

> "* * * There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. * * *. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * *.
>
> "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. * * *. The 'hearing' is the hearing of evidence and argument. * * *."

In the second *Morgan* case (*Morgan* v. *United States*, 304 U.S. 1), this Court also said, at page 14:

> "* * * The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system

> by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' * * *. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.' "

The legislative history of the Packers and Stockyards Act shows that it was modeled closely on the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1952 ed. § 1 *et seq.*). The committee report which accompanied the bill which became the Packers and Stockyards Act pointed out that the authority of the Secretary of Agriculture to issue cease and desist orders, like that of the Interstate Commerce Commission, is conditioned upon the holding of a "full hearing" (House Report No. 77, 67th Congress, 1st Sess., p. 10). This Court also has heretofore pointed out the close relationship between the Packers and Stockyards Act and the Interstate Commerce Act, *Stafford* v. *Wallace*, 258 U.S. 495, 522, 523; *Tagg Bros.* v. *United States*, 280 U.S. 420, 442. In the latter case, this Court said that (280 U.S. at p. 442) it is essential to the validity of an order of the Interstate Commerce Commission, in dealing with rates, regulations, and

practices of carriers, that the order must be based upon evidence received at a hearing when the statute calls for a hearing, and that, otherwise, "the order must be set aside." This Court said "[t]hese rules are applicable also to suits arising under the Packers and Stockyards Act."

In numerous cases dealing with the Interstate Commerce Commission, this Court has held that a "full hearing" both on the facts and the law is an absolute prerequisite to the authority of the Commission to act where the action of the Commission is predicated upon holding such a "hearing". Thus, in *Interstate Commerce Commission* v. *Louisville and Nashville R.R.*, 227 U.S. 88, 91, 92, this Court explained the right of the Commission to issue a rate order after a "full hearing" as follows:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of is fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. * * *." (227 U.S., p. 92)

Later, in *The Chicago Junction Case*, 264 U.S. 258, 264, in reversing an order of the Interstate Commerce Commission, this Court said:

> "* * * Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence

and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."[10]

The same reasoning has been followed by this Court in dealing with other situations in which administrative agencies are authorized to act only after a hearing. *Ohio Bell Telephone Company* v. *Comm'n*, 301 U.S. 292, 304; *Shields* v. *Utah Idaho Central R.R.*, 305 U.S. 177, 182.[11]

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[10] See also *United States* v. *Abilene & Southern Ry.*, 265 U.S. 274, 288; and *B. & O. R. R.* v. *United States*, 277 U.S. 291, 300. Mr. Justice Brandeis, writing for the Court in *The Chicago Junction* case, called attention to the orders which the Interstate Commerce Commission is authorized to make only after a hearing and those which need not be preceded by a hearing. See 264 U.S. at page 265, footnote 10. Similarly, under the Packers and Stockyards Act (7 U.S.C. 1952 ed. 181 *et seq.*), the Secretary is authorized to make certain rules, regulations, and orders without holding any hearing (§ 407 of the Act, 7 U. S. C. 1952 ed. § 228); but the authority of the Secretary to issue a cease and desist order under § 310 of the Act (7 U.S.C. 1952 ed. § 211)—involved in this case—is expressly made to depend upon the holding of a "full hearing."

[11] Other federal and state courts uniformly have held that, where administrative action is made to depend upon the holding of a hearing, such a hearing is an indispensable prerequisite—jurisdictional—to the taking of administrative action. *Powhatan Mining Company* v. *Ickes* (C.C.A. 6), 118 F. 2d 105, 109; *Alabama Power Company* v. *Fort Payne*, 237 Ala. 459, 187 So. 632; *Campbell* v. *Civil Service Commission*, 290 Ill. App. 105, 8 N. E. 2d 49; *Johnson* v. *Johnson*, 92 Montana 512, 15 P. 2d 842; *Atchison T. & S. F. Ry.* v. *Commerce Comm'n*, 335 Ill. 624, 167 N.E. 831; *Los Angeles*

Not only does the holding of the court below thus conflict directly with prior decisions of this Court and other courts that the Secretary of Agriculture would not be authorized to issue a cease and desist order in the absence of a factual hearing, but also the conclusion of the lower court is indefensible from a practical standpoint. When the Congress directed the Secretary to take action under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211), the Congres followed a pattern which has become increasingly familiar in recent years. It delegated to a responsible administrative official the authority to implement Congressional policy in the light of a statutory standard laid down for his guidance—in this instance, a standard of "reasonableness." It was contemplated by the Congress that the Secretary would deal with numerous factual situations upon which detailed regulation must depend. The only way the Secretary is able to

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& *S. L. Ry.* v. *Public Utilities Comm'n*, 81 Utah 286, 17 P. 2d 287; *Oklahoma Natural Gas Company* v. *Corporation Comm'n*, 90 Okla. 84, 216 P. 917; *Breakenridge* v. *Newark*, 95 N.J. L. 436, 112 A. 857; *Farmers' Elevator Company* v. *Chicago R. I. & P. R. R.*, 266 Ill. 567, 107 N.E. 841; *International Harvester Company* v. *Industrial Comm'n*, 157 Wis. 167, 147 N.W. 53. In *Powhatan Mining Co.* v. *Ickes*, *supra*, the Court of Appeals for the Sixth Circuit said (118 F. 2d at p. 109), in reviewing an order of the Department of the Interior under the old Bituminous Coal Act (Act of April 26, 1937, 50 Stat. 72):

> "* * * But we may not assume that the director would have made the same findings if full hearing had been accorded. The statute requires that in this proceeding notice and hearing be given, and this means that facts and circumstances which ought to be considered must not be excluded, and that the trier of the facts must make his findings based upon the evidence. In other words, the order itself must be based upon full hearing."

ascertain the facts upon which such regulation is conditioned is to hold hearings to receive evidence of the facts.

At the same time, such procedure enables the persons regulated to defend their actions in an orderly fashion. It was never the thought of the Congress that important questions relative to the "reasonableness" of industry rates and regulations of stockyard owners would be determined by the Secretary in the abstract, merely by listening to legal argument. Indeed, the entire administrative process has developed because of the necessity of securing informed judgments based upon administrative hearings of facts in a host of situations with which the Congress could not, itself, deal effectively because of the lack of time or detailed knowledge.

Thus, the decision of the Court of Appeals, holding that the "full hearing" provision of § 310 has been satisfied by "according the parties the right of argument" on the law, is in conflict both with authority and with reason. It will have a serious impact upon all stockyard companies with regard to their statutory responsibility, under § 307 of the Act (7 U.S.C. 1952 ed. § 208), to maintain reasonable regulations in respect to the furnishing of stockyards services and their right to defend such regulations, when challenged, in the manner prescribed by law.

The seriousness of the adverse consequences which will flow from the decision of the lower court that a factual hearing is not required is also well illustrated by the circumstances pointed out by the Secretary of Agriculture in his independent petition for a writ of

certiorari to review the judgment and opinion of the court below.[12]

In his petition, the Secretary showed that various "posted" stockyards have regulations which are similar, or substantially similar, to Regulation 10(c) of the Stock Yard Company which is involved in this proceeding. (See, also, Secretary's brief in No. 118, October Term, 1957, consolidated herewith). If the decision below—holding that such regulations may be declared invalid as a matter of law and without any factual hearing—is allowed to stand, the orderly administration of the Packers and Stockyards Act will come to a standstill.[13]

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[12] This Court granted the Secretary's petition for a writ of certiorari (*Ezra Taft Benson, Secretary of Agriculture of the United States, petitioner* v. *Producers Livestock Marketing Association, respondent*, No. 981, Oct. Term, 1956) on June 3, 1957, the same day that it granted the Stock Yard Company's petition for writ of certiorari. The two cases were consolidated for further proceedings in this Court (R. 87-88).

[13] The decision of the lower court that the Secretary may declare Regulation 10(c) of this Stock Yard Company invalid without any hearing on the facts presumably would also be applicable to rate proceedings involving the "reasonableness" of rates of stockyard owners and market agencies. Both in the case of proceedings to determine whether rates are "unreasonable" and proceedings to determine whether regulations of stockyard owners are "unreasonable", the statute requires a "full hearing" to precede any secretarial determination. There are more than 500 stockyards presently regulated by the Secretary under the Act. To require the Secretary to determine the reasonableness either of rates or of stockyard company regulations without the benefit of evidence as to their "reasonableness" developed at factual hearings would be to impose an almost impossible task upon the Secretary even if it were otherwise lawful to dispense with the "full hearing" expressly required by the law.

It is conceded both by the Association and by the court below that there was no hearing on the facts in the administrative proceeding involving the Association's complaint because the Association wanted no such hearing and refused to attend such a hearing. The Stock Yard Company demanded a hearing, both on the facts and the law, at the outset of the administrative proceeding (R. 47-48); and the Stock Yard Company has always insisted that the Judicial Officer was without authority in law to order it to cease and desist from enforcing its regulation in the absence of a "full hearing" both on the relevant facts and the law. The Judicial Officer agreed with the Stock Yard Company.

In reversing the decision of the Judicial Officer with regard to the "full hearing" requirement, the lower court wholly ignored the admonition of this Court that a hearing on both the facts and the law, as provided by § 310 of the Packers and Stockyards Act, is a rudimentary procedural requirement which cannot be ignored (*Morgan* v. *United States*, 304 U.S. 1, 15).

The foregoing is, in the view of the Stock Yard Company, dispositive of the case before this Court, requiring a reversal of the opinion and judgment below.

B.

Regulation 10(c) of the Stock Yard Company Must Be Tested Under a Statutory Standard of "Reasonableness," and the Consideration of Evidence of Record—Lacking in This Case—Is Essential to Application of Such a Standard.

The lower court also concluded that the consideration of evidence was not required—indeed, that it was irrelevant—in determining the validity of Regulation 10(c) (R. 81). Despite this conclusion—which,

itself, is erroneous—, the lower court further erred by inconsistently conjecturing facts, never considered by the Judicial Officer, upon the basis of which that court concluded that the regulation would be invalid.

1.

The Stock Yard Company is Required by the Packers and Stockyards Act to Issue "Reasonable" Regulations in Respect to the Furnishing of "Stockyard Services" and Such Regulations cannot be set Aside Unless They are "Unreasonable."

The court below utterly failed to grasp the pivotal circumstance that, under the Packers and Stockyards Act, the validity of Regulation 10(c) of the Stock Yard Company depends entirely upon whether it is a "just, reasonable, and nondiscriminatory" regulation in respect to the furnishing of reasonable stockyard services at the Denver stockyard (§307 of the Act, 7 U.S.C. 1952 ed. §208). The Stock Yard Company is required, under §304 of the Act, only "to furnish upon reasonable request, without discrimination, reasonable stockyard services * * * ." (7 U.S.C. 1952 ed. § 205).

Section 201.4(a) of the general regulations of the Secretary promulgated under the Packers and Stockyards Act expressly provides that the Stock Yard Company may maintain company regulations which are not inconsistent with or in conflict with the Act or the regulations or orders of the Secretary, 9 CFR §201.4(a).

Regulation 10(c) of the Stock Yard Company imposes conditions upon which market agencies and dealers may continue to operate at the Denver stockyard.[14] Much of the buying and selling of livestock

[14] The Stock Yard Company, as the owner of the stockyard, provides stockyard services and facilities, and its rates are regulated by the Secretary. *Denver Union Stock Yard Company* v.

at the Denver stockyard is performed by market agencies, as agents for the shippers and purchasers of livestock, on a commission basis, or by dealers. It is the position of the Stock Yard Company—set forth in its answer in the administrative proceeding—that, if the registered market agencies and dealers engage in the activities prohibited by Regulation 10(c), the patrons of the Denver stockyard, whose agents buy and sell their livestock at the Denver market, will not receive the reasonable stockyard services at that market to which they are entitled (R. 44-48); and, further, that, by registering, a market agency undertakes to perform certain public functions of a fiduciary nature for its patrons at the Denver stockyard and, thereby, disenables itself to engage in the conflicting and inconsistent activities proscribed by the regulation. *Stafford* v. *Wallace*, 258 U. S. 495, 515-516; *Tagg Bros.* v. *United States*, 280 U. S. 420, 439; *Acker* v. *United States*, 298 U. S. 426, 434; *United States* v. *Corrick*, 298 U. S. 435.

Regulation 10(c) was designed to promote the furnishing of reasonable stockyard services at the Denver stockyard by requiring market agencies and dealers operating at Denver to refrain from soliciting business for markets other than Denver, from diverting livestock from the Denver market, and from engaging in certain other acts and practices which may interfere with the normal movement of livestock to the Denver market—all of which would prevent the patrons of the

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United States, 304 U. S. 470; *In Re Denver Stockyard Company*, 10 Agr. Dec. 1033. But the successful operation of the Denver stockyard—as in the case of any stockyard—depends in great measure upon the manner in which the market agencies perform their services at the stockyard. *In Re Market Agencies at Sioux City Stock Yards*, 9 Agr. Dec. 4, 22.

Denver stockyard from receiving, at that stockyard, reasonable stockyard services.[15]

Regulation 10(c) imposes no restrictions on farmers or growers of livestock or on purchasers of livestock. The patrons of the Denver stockyard are, in no manner, subject to any part of the regulation; but the Association and the other market agencies registered to operate at the Denver stockyard are charged with responsibilities and duties of a public nature. They occupy fiduciary positions at the stockyard, since they sell and buy livestock, on a commission basis, for the patrons of the stockyard who ship their livestock to the market for sale and for those patrons who place orders with the market agencies for the purchase of livestock at the market.

In speaking of the flow of commerce in livestock through the stockyards regulated under the Packers and Stockyards Act, this Court has said that "[t]he Commissionmen are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales and to the stock farmers and feeders," *Stafford* v. *Wallace*, 258 U. S. 495, 516. Market agencies "* * * render a personal service * * *," *Acker* v. *United States*, 298 U. S. 426, 434. As this Court has said with reference to market agencies, "[i]t is true that performance of

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[15] Compare the general regulations of the Secretary which also provide that, "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area," 9 CFR § 201.63.

the specific work done by the [market agencies operating at the "posted" stockyard at Omaha, Nebraska] does not require them to invest extensive capital. But it is essential that they employ the valuable property of the stockyards corporation * * *," *Tagg Bros.* v. *United States*, 280 U. S. 420, 438. Such market agencies "* * * perform an indispensable service in the interstate commerce in live stock. * * *" *Tagg Bros.* v. *United States, supra*, p. 439. Such market agencies are thus not mere business organizations free to follow the dictates of their own interests, but, with respect to their fiduciary functions at the Denver stockyard —like fiduciaries in general—they may properly be required to refrain from engaging in activities which would interfere with their primary obligations of trust to the regular patrons of the Denver stockyard. The fiduciary nature of their function has often been stressed by the Secretary and by the courts. *Bennett Commission Company*, 2 Agr. Dec. 194; *Midwest Farmers* v. *United States* (D. Minn.), 64 F. Supp. 91, 95. In the latter case, the Court said that

> "* * * The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends upon the integrity and ethics of those engaged in marketing livestock is speaking mildly * * *."

Persons who ship livestock to the Denver stockyard for sale, or who place orders at the stockyard for the purchase of livestock, have a right to expect the

utmost loyalty from their agents. They also have a right to expect their agents to refrain from engaging in any activity which would place these agents in positions which would make their interests inconsistent with those of their principals. Market agencies thus occupy a position of high trust. Manifestly, a proper performance of their functions is vital if the stockyard at which they operate is to be equipped properly to serve its patrons.

Both the Secretary and the courts have also consistently held that a stockyard owner is under a duty to refuse the use of stockyard facilities to those market agencies and other persons who will not abide by the reasonable regulations of the stockyard owner or those whose operations would interfere with the rendition of reasonable stockyard services to the regular patrons of the market. Thus, mere registration at a stockyard by a market agency or a dealer does not require the Stock Yard Company to furnish facilities to that particular market agency or dealers. *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588.

Under the regulations of the Secretary, a market agency desiring to operate at a particular stockyard must apply to the stockyard owner for the use of pens and other facilities necessary in the conduct of the operation of the market agency (9 CFR §201.79(b)). The same regulation directs the stockyard company, in connection with such applications, to deny the use of its facilities to a market agency in any instance, *inter alia*, in which it would "impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market." *Id.* Signifi-

cantly, the general regulations of the Secretary likewise provide that no market agency shall "* * * enter into any agreement, relationship, or association with dealers or other buyers which might have a tendency to lessen the loyalty of the market agency to its consignors or impair the quality of the market agency's selling services. * * *," 9 CFR § 201.61(a).

While the Secretary, himself, has authority to prescribe regulations affecting the conduct of operations in connection with a "posted" stockyard, the authority of the stockyard owner to regulate activities of market agencies and dealers at particular stockyards has frequently been upheld even in the absence of secretarial regulations. *Carnes* v. *St. Paul Union Stockyards Company*, 175 Minn. 294, 221 N.W. 20; *Birmingham* v. *Rice Bros.*, 238 Ia. 410, 26 N.W. 2d 39; *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588; *Flynn* v. *Kansas City Stock Yards Company*, 12 Agr. Dec. 14; *Farmers Union Livestock Association* v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026; *Dougherty* v. *Union Stockyard and Transit Company*, 13 Agr. Dec. 239.

It is likewise settled that reasonable regulations under the Packers and Stockyards Act are not necessarily circumscribed by the physical boundaries of a "posted" stockyard. *In Re Tarr, Downs and Company*, 8 Agr. Dec. 517, 524; *Woarth* v. *United States* (CCA 8), 231 F. 2d 822, 824. If the activity of the market agency which is the subject of regulation has a substantial connection with the operations of the market agency at the stockyards, the regulation is valid if it is otherwise reasonable. The mere fact that

the regulation may reach collateral activities does not make the regulation suspect.[16]

It is thus clear that both the Stock Yard Company and the Secretary have authority, under the Packers and Stockyards Act, to maintain regulations with reference to operations by market agencies and dealers.

It is also clear that the Judicial Officer properly concluded that he would not be authorized to set aside Regulation 10(c) of the Stock Yard Company in the absence of evidence that it is "unreasonable."

The plain terms of the statute so provide. Such a regulation may be set aside only if the Secretary finds it to be "unreasonable." (§ 310 of the Act, 7 U. S. C. 1952 ed. § 211)

The legislative history of the Packers and Stockyards Act also shows that such a regulation may not be set aside unless it is "unreasonable." House Report No. 77, 67th Congress, 1st Sess., page 12, accompanying the bill which became the Packers and Stockyards Act, contains the following statement:

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[16] The court below cited *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015, in support of its conclusion that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law. But the *Grissim* case does not stand for the proposition that a market agency operating at a public stockyard may engage in activities inconsistent with its public responsibilities at the stockyard. Under the Packers and Stockyards Act, both the Secretary and the stockyard companies are authorized to maintain regulations to secure the rendition of reasonable stockyard services. Aside from this, particular statements by the Supreme Court of Tennessee made with reference to a factual situation not shown to be similar to any facts involved in the case at bar cannot be lifted out of context to support the decision of the lower court.

> "It is believed that the method for stockyard regulation above summarized is adequate to prevent the evils complained of. It is not the thought of the Committee [i.e., the House Committee on Agriculture] that the act will in any way interfere with * * * rules, regulations, or practices * * * not found by the Secretary to be unfair or unreasonable. * * * "

At page 10 of the same report, in dealing with Title III of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201-217a, inclusive), it is stated that

> "This title deals with the regulation of stockyards and persons doing business thereon in interstate or foreign commerce. The procedure and language are modeled very closely on the Interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads. * * * "

Section 15(1) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U.S.C. 1952 ed. § 15(1)) contains a provision authorizing the Interstate Commerce Commission to set aside railroad rates, regulations, and practices found to be "unreasonable" in almost the identical terms as those used in § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) which authorizes the Secretary to set aside rates, regulations, and practices of stockyard companies found to be "unreasonable." This Court has said, in *B. & O. R.R.* v. *United States*, 277 U. S. 291, 299, 300, with regard to a challenged practice of a railroad, that "* * * the Commission would not be authorized to set it aside without evidence that it is unjust, or unreasonable." As noted earlier, this Court has stated that principles developed in cases

arising under the Interstate Commerce Act are equally applicable to cases arising under the Packers and Stockyards Act, *Tagg Bros.* v. *United States*, 280 U. S. 420, 442.

With regard to the regulations of a stockyard company respecting the furnishing of stockyard services, the following passage from the opinion of the court in *Platt* v. *Lecocq* (C.C.A. 8), 158 Fed. 723, 731, upholding a regulation prescribed by a carrier, is particularly pertinent:

> "* * * the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them. * * *"

And, in *Louisville and Nashville R. R.* v. *United States*, 238 U. S. 1, 11, where an existing freight rate was attacked as unreasonable, this Court declared that "* * * the burden is on the complainant to establish that it is unreasonable in fact."

In the administrative proceeding, the Association deliberately refused to meet that burden by showing that Regulation 10(c) is, in fact, "unreasonable." And in the proceedings in the court below for judicial review, that court struck down the entire regulation without any evidence showing that it is, in fact, "unreasonable."

2.

The Statutory Standard of "Reasonableness" Can Not Be Applied to the Business Regulation of the Stock Yard Company Herein Involved by Any Fixed Rule of Law or Precise Formula but Only Upon Consideration of All of the Relevant Facts—Introduced in Evidence—in the Light of the Objectives of the Packers and Stockyards Act.

In holding that evidence as to the purpose, operation, and effect of Regulation 10(c) is irrelevant, the lower court totally disregarded the only manner in which the stockyard regulation may be tested, when challenged, under the standard of "reasonableness" contained in the Packers and Stockyards Act (§§ 304 and 307, 7 U.S.C. 1952 ed. §§ 205 and 208), *viz.*, by a consideration of all material facts.

In the administrative proceeding, the Judicial Officer properly held that Regulation 10(c) is a regulation in respect to stockyard services (R. 19-19) and that, on the record before him, he could not declare, solely as a matter of law, that the regulation is an "unreasonable" regulation "in respect to the furnishing of stockyard services" at the Denver stockyard (R. 32).

But the court below, totally rejecting all of the Judicial Officer's conclusions, purported to determine as a matter of law that the regulation "* * * bears no reasonable relationship to the duties required of the stockyard company under the provision [sic] of the Packers and Stockyards Act" (R. 83-84). In reaching this result, the lower court did not consider any evidence as to the relationship between the regulation and the furnishing of stockyard services at the Denver stockyard because there was no evidence to consider and also because the lower court specifically held that it was unnecessary to consider evidence in determining the validity of the regulation (R. 81).

Instead, as a matter of law, the Court of Appeals held that there could be no possible factual situation in which any part of the regulation could be reasonable (R. 81). But the Judicial Officer, being informed by experience of the manner in which regulated stockyards and market agencies operate, declared that he was unable to hold as a matter of law that no such possible factual situation could exist (R. 28). The lower court said that, "even if proved to be soundly based in fact," it was of "no legal significance" if attempts by a market agency, successful or otherwise, to divert business from the stockyard lowered the ability of both the market agency and the Stock Yard Company "to render efficient service" to the patrons of the market (R. 82). Not only does this reveal a shocking indifference to the factual nature of the controversy but also here, again, the Judicial Officer held otherwise, declaring that it could not be said that such facts, if proved, would have no "material bearing" on the validity of the regulation involved (R. 28).

The lower court thus set its fiat against the decisions of this and of other federal courts which hold that application of a standard of "reasonableness" involves a factual inquiry and an intimate understanding of the technical problems of the industry concerned, since "reasonableness" is necessarily a condition which involves factors of relation and degree and can not be resolved except by scrutiny of all pertinent facts in each case. *Sugar Institute* v. *United States*, 297 U. S. 553, 600; *Standard Oil Company* v. *United States*, 283 U. S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. "Unreasonableness is not made out by mere assertion. * * *," *Swift and Company* v. *United States*, 343 U. S. 373, 383. See, also,

Federal Power Comm'n v. *Hope Natural Gas Company*, 320 U. S. 591, 602.

Neither may the "unreasonableness" of Regulation 10(c) be determined by application of any fixed rule of law or precise formula (Cf. *Swift and Company* v. *United States*, 316 U. S. 216, 225), because the standard of "reasonableness" imposed by the Packers and Stockyards Act has a color and content which vary with the different factual settings to which the standard is to be applied (Cf. *First National Bank* v. *Beach*, 301 U. S. 435, 438); and an issue as to the alleged "unreasonableness" of action taken by a stockyard owner, in the furnishing of stockyard services, is essentially one of fact and discretion in technical matters and is "factual rather than legal." *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D. C. Okla.), 4 F. 2d 270, 271. See, Also, *United States* v. *Western Pacific Ry.*, 352 U. S. 59.

It has been the consistent administrative interpretation of the Packers and Stockyards Act that questions as to the "reasonableness" of particular actions taken by stockyard owners can not be determined by resort to a rule of law but must be resolved by scrutiny of all the evidence in each case as to the pertinent facts. *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588; *Flynn* v. *Kansas City Stock Yards Company*, 12 Agr. Dec. 14; *Farmers Union Livestock Association* v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026; and *Dougherty* v. *Union Stockyard and Transit Company*, 13 Agr. Dec. 239.

It has also uniformly been held by this Court, under the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1952 ed. § 1 *et seq.*)—upon which

the Packers and Stockyards Act was based (*Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Stafford* v. *Wallace*, 258 U. S. 495, 522-523)—that questions as to the "reasonableness" of rates, practices, and regulations of carriers depend upon an appreciation of all of the facts and circumstances in each particular case, *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304.

All of the authorities thus show that such words as "reasonable" are "not phrases of art with a changeless connotation" (*First National Bank* v. *Beach*, 301 U. S. 435, 440-441), but that a statutory standard employing such a term can only be applied in the light of all the facts.[17] As this Court said in *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, "* * * few words possess the precision of mathematical symbols," and "* * * most statutes deal with untold and unforeseen variations in factual situations. * * *." The meaning of the statutory standard of "reasonableness," used in the Packers and Stockyards Act, can not be fixed in the abstract (Cf. *First National Bank* v. *Beach*, 301 U. S. 435, 438). A variety of regulations dealing with a particular stockyard service furnished at a stockyard may be "reasonable," and, after appropriate proceedings, the choice among permissive regulations is that of the Secretary. *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U. S. 604, 614. He is the agency authorized by the Congress to strike a balance as to the "reasonableness" of a par-

[17] The standard of "reasonableness" embedded in the Packers and Stockyards Act is indicative of standards of a similar nature found in a host of other regulatory statutes conferring discretionary authority on administrative officials. See *Administrative Justice and the Role of Discretion*, *Cooper*, 47 Yale Law Journal 577-582, 1938.

ticular regulation upon a consideration of all relevant factors.

When the court below concluded that Regulation 10(c) is invalid on its face as a matter of law and bears no reasonable relationship to the duties required of the Stock Yard Company under the Packers and Stockyards Act (R. 83-84), it must be remembered that the record before the court below was devoid of "* * * facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable * * *," *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

(a) *There was no evidence relative to the furnishing of "stockyard services" at the Denver Stockyard.*— Plainly, in order to determine whether Regulation 10(c) is a "reasonable" regulation in relation to the furnishing of "stockyard services" at the Denver Stockyard, a threshold factual inquiry would be properly to determine, from evidence, the type of stockyard services which are rendered at the Denver market. The statutory definition of the term "stockyard services" simply provides that the term includes

> "* * * services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." § 301 (b) of the Act, 7 U.S.C. 1952 ed. § 201(b).

But the statute itself does not undertake to define the precise "services or facilities" to be furnished at any particular stockyard "posted" under the Act. The Act only requires the furnishing of services or facili-

ties which are reasonable. Manifestly, the exact services or facilities available at different stockyards vary. It is plain that neither the Secretary nor the court below could properly adjudicate whether the challenged regulation of the Stock Yard Company is a "reasonable" regulation in respect to the furnishing of "stockyard services" in the absence of knowledge—established by evidence of record—as to what "stockyard services" are furnished at the Denver stockyard.

(b) *There was no evidence relative to who furnishes the different kinds of "stockyard services" available at the Denver stockyard.*—Further, in order properly to relate the challenged regulation to the furnishing of "stockyard services" at the Denver stockyard, it would be necessary to consider evidence as to who renders or receives particular services. Section 304 of the Act requires both stockyard owners and market agencies to furnish, upon reasonable request, without discrimination, reasonable stockyard services at the stockyard at which they operate (7 U.S.C. 1952 ed. § 205). Thus, some "stockyard services" are rendered by the owners of public stockyards while others are rendered by the market agencies. In *Tagg Bros.* v. *United States*, 280 U. S. 420, 437 this Court—in upholding an order of the Secretary fixing the rates for the market agencies operating at Omaha, Nebraska—described in some detail the nature of operations at Omaha, calling attention to the functions of both the stockyard owner and of the market agencies, and noting that there was a division of stockyard services between the stockyard owner and the market agencies operating at the stockyard. See, also, *Acker* v. *United States*, 298 U. S. 426, 428, and *United States* v. *Corrick*, 298 U. S. 435, in which this Court also described

the different duties of market agencies at particular stockyards.

As an example of the extremely complicated organization of a typical public stockyard, reference is made to *In Re Market Agencies at the Sioux City Stock Yards*, 9 Agr. Dec. 4, which shows the necessity of considering evidence in order to understand the nature of the furnishing of stockyard services at a particular stockyard. In the *Sioux City* case, *supra*, the Judicial Officer said (9 Agr. Dec. at page 14):

> "* * * The facilities of the market place comprehend a complex organization in which definite functions are performed by the stockyard company which owns and operates the stockyard; the commission merchants or market agencies engaged in buying and selling livestock at the stockyard on a commission basis; the dealers who also buy and sell livestock for speculative purposes at the stockyard; the various classes of packer and order buyers; the Sioux City Livestock Exchange which performs certain services for the respondents and for the patrons of the stockyard; and the representatives of the Government who are stationed at the Sioux City Stock Yards, such as the market supervisor who assists in the administration of the Packers and Stockyards Act, the inspectors of the Bureau of Animal Industry of the Department whose function is to detect disease in the livestock, and the news specialists whose function is to gather and disseminate useful information relative to market conditions. In addition to the foregoing, there are facilities at the market place provided by insurance companies, railroad companies, telegraph and telephone companies, and other companies engaged in the furnishing of services essential to the operation of the market."

In the case at bar, there was nothing in the record before the court below to show which of the "stockyard

services" furnished at the Denver stockyard are furnished by the Stock Yard Company and which are furnished by the market agencies. There is no evidence as to how the Denver stockyard is organized or operated or as to the manner in which the patrons of the market receive "stockyard services." There is no evidence—because no factual hearing was held—even to show that all market agencies furnish the same stockyard services at the market.

(c) *There was no evidence relative to the effect of Regulation 10(c) upon the furnishing of "reasonable" stockyard services at the Denver stockyard.*—Also, to apply the statutory standard of "reasonableness" to the regulation of the Stock Yard Company herein involved, it would be necessary to consider evidence as to the effect of the regulation upon the furnishing of "stockyard services," both by the Stock Yard Company and by all of the market agencies at the Denver stockyard. But such evidence is also lacking.

The foregoing is not an exhaustive summary of factors which would properly have to be considered in applying the statutory standard of "reasonableness" to Regulation 10(c). Certainly, however, evidence as to the factors just enumerated would be indispensable as a minimum.

If it were known what "stockyard services" are furnished at the market, by whom they are furnished, and the effect of the challenged regulation—from a factual standpoint—upon the furnishing of those services, conclusions could then be drawn as to whether the regulation is "reasonable" or "unreasonable"—giving due weight to the major statutory purpose of the Packers and Stockyards Act, which is to promote the furnishing of reasonable "stockyard services" to

the patrons of public stockyards, *Stafford* v. *Wallace*, 258 U. S. 495.

But the court below had no such evidence before it. It decided, *in vacuo*, and without legitimate resort to any facts about the regulated business, the evils to be cured, or the way in which the regulation will affect the furnishing of stockyard services at the Denver market, that the regulation " * * * bears no reasonable relationship to the duties required of the Stock Yard Company" under the provisions of the Packers and Stockyards Act (R. 83-84).

Certainly, it cannot be said, as a matter of law, that a regulation of a stockyard owner designed to create an atmosphere in which market agencies can properly perform their duties is unreasonable. Market agencies are important to the functioning of a public stockyard. This Court has recognized the importance of their function. *Acker* v. *United States*, 298 U. S. 426, 434; *Tagg Bros.* v. *United States*, 280 U. S. 420, 439; *Stafford* v. *Wallace*, 258 U. S. 495, 515-516.

In his decision in *In Re Market Agencies at Sioux City Stock Yards*, *supra*, 9 Agr. Dec. at page 22, the Judicial Officer also recognized the importance of the function of market agencies. He said with reference to the market agencies at the Sioux City Stockyards that " * * * The Commission firms act as agent for the shipper. They furnish skilled and specialized personal services in connection with the purchase and sale of livestock * * * ." Further, the Judicial Officer said (9 Agr. Dec. at page 22) that

> " * * * The market agencies, as agents for the owners, and the different types of buyers come together under conditions of intense competition and deal with each other at arm's length in the

> strictest sense. It is the conflict between these sellers and buyers—the one seeking to obtain as much as possible for the livestock and the other seeking to pay as little as possible—that sets the market value of the livestock. * * * ."

The efficiency, therefore, with which these market agencies operate and devote themselves to their public duties determines the value of their services to the patrons of the market. *In Re Bennett Commission Company*, 2 Agr. Dec. 194; *Midwest Farmers* v. *United States* (D. C. Minn.), 64 F. Supp. 91, 95.

In view of these considerations, a regulation of a stockyard owner designed to promote the ethics of market agencies and to require them to refrain from engaging in activities inconsistent with their fiduciary responsibilities and position of public trust is reasonable if there is a proper factual basis for the regulation. The court below, in ruling that, as a matter of law, there was no reasonable relationship between Regulation 10(c) and the duties required of the Stock Yard Company quite obviously ignored the settled principles by which the validity of a stockyard regulation must be determined. The lower court plainly was not entitled to take judicial notice of complex industry facts to supply the void created by the fact-sterile record. *Ohio Bell Telephone Company* v. *Comm'n*, 301 U. S. 292, 301-302. *A fortiori*, it was error for the court to conclude that it was unnecessary to consider evidence on the issue as to the "unreasonableness" of the regulation and as to its relation to the furnishing of stockyard services at the Denver stockyard.

3.

Under the Statutory Standard, Regulation 10(c) of the Stock Yard Company May Not Properly Be Declared Invalid on the Basis of Assumed or Hypothetical Facts Conjectured by the Court Below, and that Court Erred in Holding to the Contrary.

Appropriate regard for the statutory standard of "reasonableness"—and the primary responsibility of the Secretary[18] with respect to the application of such standard—should have precluded the Court below from declaring the business regulation of the Stock Yard Company invalid on the basis of assumed or hypothetical facts conjectured by the lower court. Yet the Court of Appeals held Regulation 10(c) invalid on its face as a matter of law solely on the theory that the regulation would be invalid as applied to such hypothetical facts not in the record and never considered by the Judicial Officer.

(1) Thus, the lower court held that the challenged regulation " * * * is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing [sic] agencies to render reasonable stockyard services to its [sic] customers at *every* stockyard where they do business. * * * " (Emphasis by the lower court). That court conjectured and concluded that such a "conflict" would exist if the regulation were applied to the following factual situation assumed by it:

> "If by rendering reasonable service for a Colorado customer at one stockyard a marketing [sic] agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the

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[18] See pp. 59-65, infra, for discussion of the primary jurisdiction of the Secretary in applying the statutory standard.

agency can not perform its statutory duty in one regard or another."[19]

But there was no evidence before the Court of Appeals that the Association, or any of the other market agencies operating at the Denver stockyard—or anyone else affected by Regulation 10(c)—is engaging, or has engaged, in furnishing stockyard services to different Colorado customers in the manner assumed by the court below in the foregoing hypothesis. The court below even assumed that the stockyard services which would be rendered to the different Colorado customers, at different stockyards, could be "reasonable" in the cases of both hypothetical customers. The lower court thus indulged in an hypothesis upon an hypothesis. It ignored the circumstance that, upon the basis of a factual record, it might be properly concluded by the Secretary that a given market agency could not render "reasonable" stockyard services at more than one stockyard. As pointed out, *supra*, there is a total absence in the record of any evidence relating to the rendition of "reasonable" stockyard services either at the Denver stockyard or at any other "posted" stockyard, or of the effect of the regulation upon the furnishing of such services.

(2) The court below also made other factual assumptions devoid of evidential support as foundations for the structure of its judgment. Thus, it concluded that the sole purpose of the regulation was to safeguard the economic interests of the Stock Yard Company (R. 82). This factual conclusion is in direct conflict with the uncontradicted allegations of the Stock Yard Com-

[19] The word "if" means "in case that; granting, allowing, or supposing that; —introducing a condition or supposition." *Webster's New International Dictionary*, Second Edition, 1939, p. 1238.

pany in its answer in the administrative proceeding (R. 44-48) that the origin of the contested regulation —as well as its purpose—was embedded in the duty of the Stock Yard Company to maintain reasonable regulations in respect to the furnishing of stockyard services as required by § 307 of the Act. (7 U.S.C. 1952 ed. § 208).

(3) Further, the court below found that the challenged regulation "wounds the public interest" (R. 83)—a holding also devoid of factual support in the record.

This Court has warned, with regard to proceedings under § 310 of the Packers and Stockyards Act, that " * * * Nothing can be treated as evidence which is not introduced as such * * *. Facts and circumstances must not be considered which should not legally influence the conclusion. * * *," *Morgan* v. *United States*, 298 U. S. 468, 480; and, in *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, this Court declared that " * * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." See, *Electric Bond and Share Company* v. *Securities and Exchange Comm'n*, 303 U. S. 419, 443; *Chicago Board of Trade* v. *Olson*, 262 U. S. 1, 42. Here, as in *First National Bank* v. *Beach*, 301 U. S. 435, 438, it may be said that " * * * Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. * * *."

In the case at bar, the court below based its judgment solely on its own opinion—unaided by factual evidence—as to the validity of the regulation as ap-

plied to these hypothetical facts conjectured by it with respect to a market agency. Clearly, this requires a reversal by this Court.

4.

The Court Below Further Erred in Declaring the Regulation Invalid in Toto Because of the Hypothetical Facts Which it Conjectured with Reference to a Single Situation.

Moreover, because it felt that the regulation would be invalid with regard to a single hypothetical situation involving a market agency such as the Association, the Court of Appeals further erred by striking down the regulation *in toto*. Yet the regulation applies not only to market agencies but also to "dealers," who were not parties to the administrative proceeding. And the regulation likewise applies to other situations in which regulation by stockyard owners has long and universally been held valid by the Secretary and the courts.

"Dealers" are not required, by § 304 of the Act (7 U.S.C. 1952 ed. § 205), to render reasonable stockyard services. Thus, the theory upon which the court below declared that the regulation is invalid as to a "market agency"—namely, because the regulation, in the court's view, conflicted with the duties of market agencies under § 304—is wholly inapplicable in so far as a "dealer" is concerned. Obviously, the "reasonableness" or "unreasonableness" of the challenged regulation as to "dealers" depends upon a consideration of all of the facts respecting the operations of dealers at the Denver stockyard, with particular regard to the function which they perform in the livestock marketing process. See *Stafford* v. *Wallace*, 258 U.S. 496, 515-516, where this Court reviewed the essential functions of "dealers."

Also, Regulation 10(c)—which was held invalid by the court below in its entirety—applies to numerous situations in which it is universally recognized that regulation by stockyard owners is valid. For example, Regulation 10(c), *inter alia*, prohibits persons on the Stock Yard Company property from soliciting business for other markets or from interfering with consigned livestock received at the market. Such a prohibition has been held valid. *Fort Worth Stockyards Company* v. *Brown*, 161 S.W. 2d 549 (Texas).

Under the general regulations of the Secretary issued pursuant to § 407 of the Act (7 U.S.C. 1952 ed. § 228)—applicable at more than 500 regulated stockyards—the Secretary, himself, has provided that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area," 9 CFR § 201.63. This secretarial regulation is significantly similar to Regulation 10(c) of the Stock Yard Company which was invalidated *in toto* by the Court of Appeals.

Regulation 10(c) is also identical with, or significantly similar in many respects to, the regulations of many other regulated stockyard companies. See p. 33, *supra*. These regulations—including many parts of Regulations 10(c)—have in many cases been in effect for years, and they constitute an important and vital means by which the livestock marketing process is conducted.

Yet, the effect of the action of the court below is "* * * to bar all regulation by [holding] that regu-

lation in a situation not presented would be invalid. * * * ," *Associated Press* v. *Labor Board*, 301 U. S. 103, 132. Clearly, this Court should not permit the action of the lower court to stand.

5.

Primary Jurisdiction Rests with the Secretary—Not the Reviewing Court—to Apply the Statutory Standard of "Reasonableness."

Not only did the court below completely disregard the settled principles by which the statutory standard of "reasonableness" must be applied—namely, by a consideration of evidence of record as to all of the pertinent facts— but also that court, in a shocking manner, ignored the repeated decisions of this Court which clearly show that primary jurisdiction rests with the Secretary—not a reviewing court—to apply the statutory standard of "reasonableness."

Thus, in disposing of this case on the basis of assumed or hypothetical facts conjectured by it, the lower court ignored the circumstance that none of the factual assumptions which it conjectured was the subject of findings or conclusions by the Judicial Officer in the administrative proceeding. Indeed, the Judicial Officer carefully and pointedly refrained from making any finding as to the "reasonableness" or "unreasonableness" of the challenged regulation because of the absence in the record of essential factual evidence upon which such findings must depend (R. 16). Clearly, until the Secretary has made a finding as to the "reasonableness" or "unreasonableness" of Regulation 10(c) and as to other pertinent facts, the matter is not properly subject to judicial inquiry.

Here, for example, the Judicial Officer made no finding with regard to the situation involving the

hypothetical market agency conjectured by the court below. The Judicial Officer likewise made no finding that the challenged regulation was or was not issued to safeguard the economic interests of the Stock Yard Company, or that the challenged regulation, to use the words of the court below, "wounds the public interest" (R. 83). Clearly, primary jurisdiction lay with the Secretary to consider all such matters. *Kelly* v. *Union Stockyard and Transit Company* (CCA 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D. C. Okla.) 4 F. 2d 270, 271. See, also, *United States* v. *Western Pacific Ry.*, 352 U. S. 59. This Court has pointed out that, under the Packers and Stockyards Act, " * * * the Secretary is the guardian of the public interest in regulating a business of public concern * * * ," *United States* v. *Morgan*, 313 U. S. 409, 415. Until the Secretary has found that a regulation "wounds the public interest," or is contrary to the public policy embedded in the Packers and Stockyards Act, or conflicts with some provision of the Packers and Stockyards Act, " * * * the fact can not be said to exist, and meantime it is not subject to judicial inquiry and proof. * * * ," *United States* v. *Brown* (D. C. Okla.), 4 F. 2d 270, 271. The courts are not the arbitors of the paramount public interest, because this is the business of the Secretary "made such by the very terms of the statute." (Cf. *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535, 536).

Furthermore, in other respects also, the court below completely departed from the accepted function of a court charged with reviewing the action of an administrative agency which has primary responsibility for the administration of an important regulatory statute.

In the case at bar, the Judicial Officer properly

concluded that, before he could relate the challenged regulation to the statutory standard of "reasonableness," it would be necessary for him to consider evidence (R. 32); and he was warranted in dismissing the complaint when the Association—upon whom rested the burden of proof—refused to come forward at a hearing with such evidence.

The Judicial Officer, in reaching this result, gave careful consideration to every argument advanced

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[20] The Judicial Officer gave careful and extensive consideration to the Association's arguments that Regulation 10(c) should be declared invalid on its face as a matter of law, without a factual hearing, *inter alia*, because of the general laws relating to public utilities and the antitrust laws (R. 24-32). The Judicial Officer concluded correctly that the validity of a regulation of a public utility necessarily involves a factual inquiry as to its "reasonableness" (R. 28). A public utility must deal only with those persons who comply with the reasonable regulations established by the utility to conduct its affairs for the benefit of its patrons, and a utility may deny services and facilities to those who interfere with the primary duty of the utility to its patrons. *DeVries v. Sig Ellingson and Company* (D. Minn.), 100 F. Supp. 781; 786, affirmed 199 F. 2d 677 (CCA 8); *Carnes v. St. Paul Union Stockyards*, 175 Minn. 294, 221 N.W. 20; *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W. 2d 39. Also, a public utility is not prevented from entering into reasonable contractual relations which do not interfere with its public responsibilities. *Twin City Pipe Line Company v. Harding Glass Company*, 283 U. S. 353, 355-357. The question of the reasonableness of action taken by a public utility is one of fact and each case must largely depend upon the circumstances involved. *Manufacturers Ry. v. United States*, 246 U. S. 457, 481. As to "posted" stockyards, it has been determined by the Secretary that they are not required to furnish services or facilities to every market agency or dealer. *Gilbert R. Smith v. Union Stock Yards Company*, 9 Agr. Dec. 588. The Secretary's regulations provide that stockyard owners must not furnish services or facilities to market agencies if it would interfere with the "efficiency of operations or the reason-

by the Association to support its contention that Regulation 10(e) is invalid on its face as a matter of law and that a factual hearing to determine its invalidity is unnecessary, finding such arguments to be without merit."

The court below was clearly unwarranted in rejecting the Judicial Officer's conclusions in these respects and in substituting its judgment for that of the Judicial Officer. *United States* v. *Morgan*, 313 U. S. 409, 417; *Acker* v. *United States*, 298 U. S. 426, 433-434; *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 51; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442-445. See, also, *Securities and Exchange Comm'n* v. *Central Illinois Corporation*, 338 U. S. 96, 127; *Levinson* v. *Spector Motor Company*, 330 U. S. 649, 672; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Colgate Palmolive Peet Company* v. *United States*, 321 U. S. 67, 87-89; *Gray* v. *Powell*, 314 U. S. 402, 411-413; *United States* v.

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ableness of stockyard services furnished patrons of the market" (9 CFR 201.79(b)).

To the extent that it was proper for the Judicial Officer to consider the antitrust argument of the Association in the administrative proceeding under the Packers and Stockyards Act (Compare, *Manufacturers Ry.* v. *United States*, 246 U. S. 457, 480, *McLean Trucking Company* v. *United States*, 321 U. S. 67, 73-88, and *Federal Communications Comm'n* v. *RCA Communications*, 348 U. S. 86, 91-97, with *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439), he properly concluded (R. 32) that it would be necessary to consider evidence as to the purpose, operation, and effect of Regulation 10(e), in the light of the facts surrounding the marketing of livestock at the Denver stockyard, before any conclusions could be reached with respect to the antitrust laws. *United States* v. *DuPont and Company*, 351 U. S. 377, 413; *Sugar Institute* v. *United States*, 297 U. S. 553, 600; *Standard Oil Company* v. *United States*, 283 U. S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

American Trucking Association, 310 U. S. 534, 549; *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, 315. In *St. Joseph Stock Yards Company* v. *United States*, *supra*, this Court said (298 U. S. at page 51):

> "* * * The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. * * *."

Here, as in *Securities and Exchange Comm'n* v. *Chenery Corporation*, 332 U. S. 194, 208, it may properly be said that the Judicial Officer's conclusion

> "* * * rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies * * *. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of administrative process. See *Republic Aviation Corporation* v. *Labor Board*, 324 U. S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we can not disturb."

What this Court said in upholding a rate order of the Secretary as "reasonable" under the Packers and Stockyards Act also is particularly appropriate with regard to the decision of the Judicial Officer involved in the case at bar. In *United States* v. *Morgan*, 313 U. S. 409, this Court stated at p. 415 that:

> "* * * Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items

> on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. * * *"

At page 417 of its opinion in the same case, this Court said:

> "* * * We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. * * * We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On an ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment."

The action taken by the Court of Appeals in this case is especially shocking in view of the circumstance that the Judicial Officer never reviewed the hypothetical facts conjectured by the court which furnished the sole basis for its action. Thus, the lower court not only substituted its judgment for that of the Judicial Officer but also it did this on the basis of factual conjectures not considered by the administrative official having primary responsibility in the premises. Such action by the court below is in direct conflict with the applicable decisions of this Court and is a far departure from the accepted and usual course of judicial proceedings.

The court below was not called upon to determine the validity of the challenged regulation of the Stock Yard Company. The simple question before that court related to whether the Judicial Officer's decision to

dismiss the administrative proceeding was proper in view of the Association's refusal to submit any evidence as to the "unreasonableness" of Regulation 10(c).

In view of the action of the court below, this Court is now called upon to determine whether the Court of Appeals properly performed its function as a reviewing court by substituting its judgment for that of the Judicial Officer. Clearly, the court below did not fulfill its proper role when it refused to recognize the primary responsibility of the Secretary under the Packers and Stockyards Act but, instead, itself undertook to determine the validity, as a matter of law, of an important regulation dealing with a highly complex livestock marketing problem.

II.

THE COURT OF APPEALS WAS NOT AUTHORIZED TO INTERFERE WITH THE DISCRETIONARY AUTHORITY CONFERRED EXCLUSIVELY BY THE CONGRESS UPON THE SECRETARY AND TO "DIRECT" THE SECRETARY—WITHOUT ANY FACTUAL RECORD—TO ENTER A CEASE AND DESIST ORDER IN THE ADMINISTRATIVE PROCEEDING.

The Court of Appeals in another respect wrongfully invaded the discretionary area conferred by the Congress exclusively upon the Secretary. The judgment of the court below directs the Judicial Officer "* * * to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)."[21] (R.

[21] Attention has already been called to the error of the court below in striking the regulation down in its entirety, simply because the court was of the opinion that the regulation would be invalid in a single hypothetical situation conjectured by it with reference to "market agencies." See, *supra*, pp. 57-59.

84). The Court of Appeals had no authority to impose such directions upon the Judicial Officer even if the latter had erred—which he did not—in dismissing the complaint filed by the Association. The authority of the reviewing court is limited by the Hobbs Act (5 U.S.C. 1952 ed. (Supp. IV) § 1032) to an order "* * * to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the final order of the Judicial Officer (See also, 5 U.S.C. 1952 ed. § 1039(a)). That final order in this proceeding was the order dismissing the Association's complaint.

Thus, had the Judicial Officer, himself, decided after a full hearing that part or all of Regulation 10(c) is invalid as applied to the Association, he would have had several discretionary courses open to him. He could "determine and prescribe what will be the just and reasonable * * * regulation * * * to be thereafter followed." He, at his discretion, could have issued an order that the Stock Yard Company should "cease and desist from such violation," and that order could, again in the Judicial Officer's discretion, be limited "to the extent to which the Secretary finds" that such violation "does or will exist" (§ 310 of the Act, 7 U.S.C. 1952 ed. § 211). But the court below preempted to itself all of this discretionary authority.

This Court has made it clear that, in reviewing the actions of administrative agencies for errors of law, the reviewing courts have no authority to "* * * foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. * * *." *Federal Communications Comm'n* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145. If, indeed, the Judicial Officer had committed an error of law, the only appropriate judg

ment would have been to direct the Judicial Officer "* * * to proceed within the framework of [his] own discretionary authority on the indicated correct principles * * *." *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 136. See *Securities and Exchange Comm'n v. Chenery Corporation*, 332 U. S. 194, 200-201; *Ford Motor Company v. Labor Board*, 305 U. S. 364, 374; and *Federal Radio Comm'n v. Nelson Bros. Company*, 289 U. S. 266, 278.

Thus, it is clear that, under no circumstances, did the court below have authority to direct the Judicial Officer as to the type of order to be entered in the administrative proceeding.

Moreover, if the judgment of the lower court is permitted to go into effect,[22] the Secretary, acting through the Judicial Officer, is not only confronted with a mandate to strike down this particular regulation without any factual hearing but, also, he will be confronted with a problem arising from the fact that regulations similar to the one herein involved are in force in many of the major stockyards posted under the Act. See pp. 33, 58, *supra*.

These regulations have undoubtedly played an important part in the stockyards industry for years. Clearly, both the stockyard companies involved and the Secretary will be faced with an overwhelming difficulty if all these regulations are to be stricken down as a matter of law.

If the judgment of the lower court is reversed, the Secretary will be free to entertain any such proceedings with reference to Regulation 10(e)—or similar

[22] The judgment of the Court of Appeals has been stayed pending consideration of the case by this Court (R. 84).

regulations of other stockyards—as he may deem appropriate in carrying out his responsibilities under the Packers and Stockyards Act. Any such proceedings may be entertained by the Secretary either upon complaint or upon his own initiative, if he deems such proceedings necessary. It is to be presumed that the Secretary will carry out his duty in this regard just as, in the administrative proceeding herein involved, he gave the Association every opportunity to pursue the customary procedure for resolving issues such as those raised by the Association, *viz.*, a procedure involving an orderly hearing on the facts so as to enable an intelligent decision to be made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

Pertinent Provisions of the Packers and Stockyards Act of 1921, as Amended

Sec. 301, 7 U.S.C. 1952 ed. § 201:

When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" mean any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

Sec. 304, 7 U.S.C. 1952 ed. § 205:

It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon

failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title.

Sec. 307, 7 U.S.C. 1952 ed. § 208:

It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

Sec. 310, 7 U.S.C. 1952 ed. § 211:

Whenever after full hearing upon a complaint made as provided in section 210, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

APPENDIX B

Regulation 10(c) of the Stock Yard Company

(Tariff No. 14 of the Denver Union Stock Yard Company, Regulation 10(c), on File in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture)

"Item 10

Interference with Operations

"(a) . . .

"(b) . . .

"(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

"The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its

intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highfway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

"The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE DENVER UNION STOCK YARD COMPANY, *Petitioner*,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

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INDEX

Page

I. The Respondent Improperly Seeks a Judicial Determination as to the "Reasonableness" of the Petitioner's Regulation Upon a Record Devoid of Facts and in the Face of an Administrative Conclusion That Facts Are Essential to Such Determination 1

II. In Particular, the Respondent Indulges in Erroneous Assertions Concerning Its Status and the Effect of Petitioner's Regulation on the Patrons of the Denver Stockyards 3

III. The Respondent Misstates to This Court That the Petitioner Elected to Have the Validity of Its Regulation Determined Without a Hearing on the Facts 9

Conclusion 14

CITATIONS

CASES:

Acker v. *United States*, 298 U.S. 426, 428 6
Chicago Board of Trade v. *United States*, 246 U.S. 231, 238 2
Chicago, St. Louis and New Orleans R. Co. v. *Pullman Southern R. Co.*, 139 U.S. 79, 89-90 7
Eccles v. *Peoples Bank*, 333 U.S. 426, 432 .....13, 14
The Express Cases, 117 U.S. 1, 24 7
First National Bank v. *Beach*, 301 U.S. 435, 438 .. 14
Midwest Farmers v. *United States* (D. Minn.), 64 F. Supp. 91, 95 4
Stafford v. *Wallace*, 258 U.S. 495, 516 6
Swift & Co. v. *Hocking Valley R. Co.*, 243 U.S. 281, 289 9
Tagg Bros. v. *United States*, 280 U.S. 420, 437 6
Tagg Bros. v. *United States* (D.C. Neb.), 29 Fed. 2d 750, 752, affirmed 280 U.S. 420 6
United States v. *Corrick*, 298 U.S. 435 6

AGRICULTURE DECISIONS: Page

In Re Producers Livestock Marketing Association and Western Order Buyers, 14 Agr. Dec. 109 7
Gilbert R. Smith v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597 5

STATUTES:

Hobbs Act (64 Stat. § 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV), § 1031 *et seq.*) 3
Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 1952 ed. § 181 *et seq.* 2
§ 301(b) (7 U.S.C. 1952 ed. § 201(b)) 4
§ 301(c) (7 U.S.C. 1952 ed. § 201(c)) 3
§ 303 (7 U.S.C. 1952 ed. § 203) 5
§ 310 (7 U.S.C. 1952 ed. § 211) 9

REGULATIONS:

Regulations and Rules of Practice under the Packers and Stockyards Act:
9 C.F.R. § 201.61(a) 6
9 C.F.R. § 201.79(b) 5

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

We desire to reply to the arguments of the respondent in its brief in three respects:

I.

The Respondent Improperly Seeks a Judicial Determination as to the "Reasonableness" of the Petitioner's Regulation Upon a Record Devoid of Facts and in the Face of an Administrative Conclusion That Facts Are Essential to Such Determination.

The respondent ignores the real issues and, instead, seeks to have this Court affirm a determination by the Court of Appeals concerning the validity of the petitioner's regulation made upon a record barren of facts.

To this end, the respondent makes factual statements throughout its brief concerning the purpose, operation, and effect of the petitioner's regulation. The respondent even purports to quote a statement of the petitioner concerning the effect of the challenged regulation although no such statement was ever made by the petitioner (Respondent's brief, top of page 3). All of these statements by the respondent were denied by the petitioner in its pleadings in the administrative proceeding (R. 44). No factual hearing was held respecting the issues thus joined, solely because of the respondent's refusal to attend such a hearing and to prosecute its claim that the regulation is invalid because it is "unreasonable" (R. 72), which is the governing standard under the Packers and Stockyards Act (42 Stat. § 159, as amended, 7 U.S.C. 1952 ed. § 181 *et seq.*) by which the regulation must be tested. This Court frequently has pointed out the necessity of factual hearings to resolve issues as to the "reasonableness" of important industry regulations in the light of their purpose, operation, and effect. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238. Clearly, unfounded and untruthful assertions by the respondent furnish no basis for a judicial determination of the validity of petitioner's regulation.

The respondent has not attempted to meet the real issues presented to this Court. These issues are whether the Court of Appeals was correct in holding in this case that the submission of evidence is not necessary to constitute the "hearing" required by law; that all evidence as to the reasonableness of the regulation is immaterial—no matter by whom presented; that, as applied to hypothetical facts not in the record but conjectured by the court below, the regulation is in-

valid in its entirety; and that the court was authorized to invade the discretion of the Secretary by directing the Judicial Officer as to the type of administrative order to be entered.

The court below was not called upon to determine the validity of the challenged regulation, because the Judicial Officer specifically did not pass upon that issue. The simple question before the lower court was whether the Judicial Officer's decision to dismiss the administrative proceeding was proper in view of the respondent's refusal to submit any evidence as to the "unreasonableness" of the challenged regulation.

In view of the incredible action of the court below, the only issues now before this Court are correctly set forth in our main brief and raise the question whether the Court of Appeals properly performed its function as a reviewing court under the Hobbs Act (64 Stat. § 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV), § 1031 *et seq.*).

II.

In Particular, the Respondent Indulges in Erroneous Assertions Concerning Its Status and the Effect of Petitioner's Regulation on the Patrons of the Denver Stockyards.

The respondent relies heavily upon its mistaken notion that it is a patron of the petitioner's market. But the respondent is not in the position of a patron of the Denver stockyard. The patrons—the shippers and buyers of livestock—are not denied stockyard services under any circumstances because of the challenged regulation and the regulation is not even applicable to the patrons.

The respondent has only the status of a "market agency"[1] at that stockyard and, as such, is merely one

[1] Section 301(c) of the Act, 7 U.S.C. 1952 ed. § 201(c).

of the instrumentalities through which "stockyard services"[2] are furnished by the petitioner at the stockyard to the patrons of the market, particularly selling and buying services.

The respondent has no inherent right to perform selling and buying services as a market agency at the Denver stockyard. The Denver stockyard is not operated for the benefit of such market agencies but, rather, it is operated for the benefit of the sellers and buyers of livestock who desire to avail themselves of the services offered at the stockyard. Market agencies can be permitted to operate at the Denver stockyard only if their operations are compatible with the best interests of all of its patrons.

To preserve the best interests of the patrons of a stockyard in the selling and buying process, it is necessary for the market agencies through which such selling and buying services are furnished to devote themselves to the interests of their principals. *Midwest Farmers* v. *United States* (D. Minn.), 64 F. Supp. 91, 95.

In its pleadings filed in the administrative proceeding, the petitioner alleged that it issued its regulation to make it possible for its patrons to receive the reasonable selling and buying services at the Denver stockyard to which they are entitled (R. 46). Further, the petitioner was prepared to submit proof to this effect at a factual hearing, and would have done so except for the circumstance that the respondent refused to appear at such hearing and prosecute its charges concerning the "unreasonableness" of the challenged regulation.

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[2] Section 301(b) of the Act, 7 U.S.C. 1952 ed. § 201(b).

A market agency, such as the respondent, may not even begin to do business at a stockyard subject to the Act without first registering with the Secretary, as provided in § 303 of the Act (7 U.S.C. 1952 ed. § 203). Even after it has registered as a market agency with the Secretary, a market agency, such as the respondent, may not operate, as of right, at the stockyard. It must also secure the permission of the stockyard owner, such as the petitioner, and agree to abide by the regulations of the owner designed to make it possible for the patrons of the stockyard to receive reasonable stockyard services. It is the settled administrative practice under the Act that

> "* * * Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business * * *." (*Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597).

Under his general regulations, the Secretary has specified many factors which a stockyard owner may take into consideration in deciding whether to permit a given person to operate as a market agency at a stockyard. For example, it is provided, *inter alia*, that a stockyard owner shall not assign facilities to a particular market agency at a stockyard if the operation of such market agency would ". . . impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market" (9 CFR § 201.79(b)). Also, the Secretary has, himself, provided that no market agency shall enter into any relationship ". . . which might have a tendency to lessen the loyalty of the market agency to its consignors

or impair the quality of the market agency's selling services . . ." (9 CFR § 201.61(a)).

This Court has also recognized the true status of a market agency, *viz.*, that it is a mere instrumentality at a stockyard through which services are furnished to the patrons of the market and that the market agency is not, itself, a patron. *Stafford* v. *Wallace*, 258 U.S. 495, 516; *Tagg Bros.* v. *United States*, 280 U.S. 420, 437; *Acker* v. *United States*, 298 U.S. 426, 428; and *United States* v. *Corrick*, 298 U.S. 435. Indeed, as *Stafford* v. *Wallace*, *supra*, so aptly shows, one of the chief reasons for the passage of the Packers and Stockyards Act was to control the activities of market agencies and dealers at the public stockyards which were making it impossible for the patrons of those stockyards to secure the reasonable stockyard services to which they were entitled.

> "* * * The gist of the business is no different because the public stockyards company assigns and turns over the use of its public facilities to the [market] agencies for the performance of their function, and lets them carry on the marketing in the yards. * * *". (*Tagg Bros.* v. *United States* (D.C. Neb.), 29 F. 2d 750, 752, affirmed 280 U.S. 420).

The history of regulation under the Act demonstrates the necessity of continuing supervision of the activities of market agencies at public stockyards if the best interests of the patrons of stockyards are to be preserved. For example, only recently, this very respondent was the subject of disciplinary action by the Secretary to prohibit it and its officers from engaging in actions detrimental to the interests of stockyard

patrons. *In Re Producers Livestock Marketing Association and Western Order Buyers*, 14 Agr. Dec. 109.

The relationship of a stockyard company and of a market agency is similar, in many respects, to that of a railroad company and an express company. In *The Express Cases*, 117 U.S. 1, 24, this Court held that a railroad has a duty to furnish the public reasonable express service but that it owes no duty to the public as to the particular agencies it may select for that purpose. Such service may be furnished by the railroad through its own employees or it may select one or more express companies whose employees will furnish the service. The railroad is not a "common carrier" of express companies. They have no right to use the facilities of a railroad. See, also, *Chicago, St. Louis and New Orleans R. Co.* v. *Pullman Southern R. Co.*, 139 U.S. 79, 89-90.

So, in the stockyards industry, while a stockyard company has a duty to furnish services for the buying and selling of livestock, it may perform this duty through other instrumentalities or "market agencies" which, also, are then required by law to render reasonable stockyard services—but this does not relieve the stockyard company from its duty to see to it that reasonable stockyard services are furnished the farmers and shippers and buyers who constitute the patrons of the stockyard.

Respondent does not, therefore, wear the mantle of a patron of the Denver stockyard. For this reason alone, the respondent's reliance upon authorities dealing with the duties of public service companies to their patrons is misconceived.

Actually, no patron[3] of the Denver stockyard would be denied stockyard services because of the challenged regulation. Such regulation is applicable solely to the respondent and to other market agencies engaged in performing services at the stockyard for the patrons of the market. All of the activities proscribed by the regulation in so far as it is challenged herein are activities of market agencies—not activities of shippers and buyers of livestock; and obviously, the validity of the regulation as applied to the respondent depends upon the "reasonableness" of the regulation considered in the light of the facts relative to the livestock marketing process at the Denver market and relative to the functions which market agencies are supposed to perform in that process. The record now before the Court contains no such facts.

Thus, even if the issue as to the validity of the petitioner's regulation were ripe for consideration by

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[3] Since the respondent refused to present evidence at a factual hearing, there is nothing in the record to indicate how the respondent is organized or operates as a cooperative organization. But, in any event—contrary to the assertions of the respondent in its brief—, the shippers and buyers of livestock who may belong to the respondent would not be denied stockyard services by the petitioner under any circumstances. They, like all of the other patrons of the Denver stockyard, will always be furnished with reasonable facilities for the sale and purchase of their livestock at the Denver market if they so desire. Obviously, however, no patron may insist that such services and facilities be furnished to it in any particular manner or by any particular means, and this is especially so if such manner or means makes it impossible for the patrons of the stockyard, as a whole, to receive the reasonable stockyard services to which they are entitled. Moreover, there is no statutory requirement that the stockyard company must differentiate in its regulations between market agencies which are organized as cooperative marketing associations and those which function through any other form of business entity.

this Court, there would be no merit to the respondent's arguments that it is a patron of the Denver stockyard or that the challenged regulation imposes unlawful restrictions upon the furnishing of services to the patrons of the Denver stockyard.

III.

The Respondent Misstates to This Court That the Petitioner Elected to Have the Validity of Its Regulation Determined Without a Hearing on the Facts.

The petitioner never elected to have the validity of its challenged regulation determined solely as a matter of law and without a consideration of the facts; nor does the petitioner agree with the respondent that this might be done.

Even if the parties in the administrative proceeding had so agreed, the Secretary would not be bound by such an agreement in view of the "hearing" provision of § 310 of the Act (7 U.S.C. 1952 ed. § 211). The Judicial Officer decided that a factual hearing, which the respondent refused to attend, was an indispensable prerequisite to resolve the issues raised by the pleadings in the administrative proceeding (R. 32). See *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U.S. 281, 289).

Aside from this, the respondent has simply misstated to this Court the petitioner's position respecting the necessity of a hearing.

The principal position of the petitioner throughout all of these proceedings has been that, in view of the "hearing" requirement of § 310 of the Act (7 U.S.C. 1952 ed. § 211), the Secretary can not declare its regulation either "reasonable" or "unreasonable" without consideration of the facts concerning its purpose,

operation, and effect.[4] A brief reference to the facts of record will make this clear.

In the administrative proceeding, the Hearing Examiner issued a ruling (after an application by the petitioner for a *subpoena duces tecum*), in which he held that a hearing on the facts was required to determine the "reasonableness" or "unreasonableness" of the regulation; and he indicated that he would issue the requested *subpoena* after the respondent, who was the complainant in the administrative proceeding and had the burden of proof, had presented its evidence (R. 70-71). Immediately, the respondent filed an "Election to Rest," stating that it would "not present evidence in this cause as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter or law" (R. 72).

The petitioner then moved to dismiss the administrative proceeding. But the motion to dismiss was not predicated upon the petitioner's willingness to have the validity of its regulation decided as a matter of law without the consideration of facts. On the contrary, such motion was based entirely upon the respondent's failure to proceed as directed by the Hearing Examiner and as required by the law (R. 73). The Hearing Examiner so understood the motion of the petitioner. He agreed that, because of the respondent's failure, the proceeding should be dismissed, and, accordingly, certi-

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[4] Even apart from the statutory requirement for a hearing on the facts, practical considerations preclude the Secretary from determining the "reasonableness" or "unreasonableness" of stockyard regulations unless the Secretary has an opportunity to ascertain and study the facts upon which "reasonableness" depends. The Secretary is not omniscient although the Court of Appeals evidently thought he should be.

fied the case to the Judicial Officer, recommending that it be dismissed (R. 73).

There is thus nothing whatever in the record to support the respondent's representation to this Court that the petitioner "conceded an evidentiary hearing was unnecessary" (Respondent's brief, p. 7), or that "The Hearing Officer conceded an oral hearing was no longer necessary" (Respondent's brief, p. 13) in order to test the validity of the regulation. Indeed, in his certification to the Judicial Officer (R. 73), the Hearing Examiner specifically referred to his prior ruling that a hearing on the facts would be necessary in order to determine the "reasonableness" or "unreasonableness" of the regulation (R. 70-71).

The Judicial Officer also referred to the petitioner's motion as a motion to dismiss "because of the [respondent's] failure to prosecute the proceeding by making out a prima facie case" (R. 11). Elsewhere he stated that it was "based upon the [respondent's] election not to adduce evidence at a hearing following the hearing examiner's ruling that the disputed regulation was not invalid on its face and that a hearing upon the facts was necessary" (R. 15).

The Judicial Officer considered the issues presented to him. One of these was the respondent's contention that the challenged regulation was invalid on its face as a matter of law and the other was the petitioner's contention that, upon the record before him, the Judicial Officer would not be warranted in holding the challenged regulation invalid. The Judicial Officer upheld the ruling previously made by the Hearing Examiner to the effect that the validity of the regulation could not be determined as a matter of law and in the absence of a hearing on the facts (R. 32).

The Court of Appeals also understood that both the petitioner and the Judicial Officer were of the view that a factual hearing was necessary and that the petitioner had never waived such a hearing. In this connection the Court of Appeals said:

> "* * * At the hearing set before the judicial officer of the Department of Agriculture [respondent] elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law, illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon [respondent] and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application * * *" (R. 80).

Elsewhere, the Court of Appeals said:

> "It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a 'full hearing' with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations, 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(c) was reasonable and necessary to prevent market agencies in the position of [respondent] from undermining the business and public efficiency of the yard by the solicitation of business for other yards" (R. 81).

Thus, neither the Hearing Examiner, the Judicial Officer, nor the Court of Appeals understood that the petitioner had agreed with the respondent to waive a

hearing on the facts. The case was decided below upon a contrary basis.

Indeed, the Court of Appeals felt compelled to consider at length the hearing requirement of the law, holding that the "submission of evidence is not required" to constitute a "full hearing" under the Act and that the requirement had been satisfied by "according the parties the right of argument" merely on legal issues (R. 81-82). The lower court then proceeded to declare the regulation invalid but that court did not simply hold the regulation invalid on its face as a matter of law. Instead, the real basis of the decision by the Court of Appeals was that the regulation would be invalid, in that court's view, as applied to a hypothetical factual situation conjectured by that court (R. 82) which finds no support in the record. This constitutes error by the lower court requiring reversal (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432), as we have shown in our main brief.

Seeking further to justify its contention that petitioner's regulation may be declared invalid as a matter of law in the absence of a factual hearing, the respondent enumerates various fanciful factual situations and suppositions—including such imaginary regulations as those dealing with red-headed men—and asserts that such regulations by a stockyard company might properly be declared invalid without a hearing (Respondent's brief, pp. 46-53).

The short answer to all of this is that the petitioner's challenged regulation, on its face, has no application to such fancied factual situations conjectured by the respondent. This Court has repeatedly made it clear that it is improper for a court to depart from the con-

crete case before it (*First National Bank* v. *Beach*, 301 U.S. 435, 438), or to give advisory opinions as to constitutional issues or even issues short of constitutionality (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432) which are not immediately necessary for purposes of decision. These principles are especially applicable where, as here, in a carefully considered decision, the Judicial Officer refrained from passing upon the validity of the regulation, declaring that facts are essential to such a determination.[5] It will be time enough to consider the imaginary cases discussed by the respondent if they ever arise.

CONCLUSION

In order to uphold the contentions of the respondent it would be necessary for this Court to reject all of the principles which it has heretofore established with regard to the proper alignment of functions between administrative agencies and those of courts charged with reviewing administrative decisions. Clearly, the Court of Appeals ignored these principles, for the reasons which we have shown in our main brief, and

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[5] The Judicial Officer, of course, had no authority to require the respondent to rely upon any position other than that which it did. The dismissal of the complaint by the Judicial Officer did not affect the Secretary's own jurisdiction thereafter to hold a factual hearing on his own motion, or upon a fresh complaint of another party, if such were deemed proper, concerning the regulation. But the Court of Appeals has precluded the Secretary from carrying out his administrative responsibilities in this respect, since that Court declared the entire regulation invalid and directed the Secretary also to issue such a declaration without further hearing. Only a reversal of the judgment of the lower court will enable the Secretary to perform his duties.

the public interest imperatively demands that its judgment be reversed.

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IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

No. ~~617~~ 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
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INDEX

	Page
Question Presented	1
Statement of the Case	5
Argument	9
1. Denver Union Stock Yard Company Is A Public Utility.	9
2. Denver Union Stock Yard Company As A Public Utility Is Under Duty To Furnish Stockyard Services To Respondent And Others Without Discrimination.	12
3. The Stock Yard Company's Regulation Is Illegal For Demanding Exclusive Patronage By Respondent And Others As A Condition To Furnishing Them Stockyard Services. Public Utilities May Not Demand Exclusive Patronage.	13
4. The Stock Yard Regulation Denying Service To Those Who Deal In The Country — A Collateral Matter — Is Illegal. Public Utilities May Not Refuse Service Because Of A Collateral Matter Not Related To The Service.	15
5. The Regulation Is Monopolistic, And, Therefore, Illegal.	17
6. The Regulation Is Invalid On Its Face.	20
7. The Regulation Being Illegal On Its Face, "Full Hearing" Required No Evidence.	21
8. Petitioner's Complaints Against The Decision Of The Court Of Appeals Are Without Merit.	24
Conclusion	29

TABLE OF CITATIONS

Page

Cases:

Akron C. & Y. Ry. Co. vs. U.S., 261 U.S. 184. 43 S. Ct. 270 22

Allen C. Driver, Inc. vs. Wells (Md.) 86 A. 2d 724 11

Ashline vs. Pub. El. L. Co. (Vt.) 44 A. 2d 164 16

Birmingham vs. Rice Bros., 238 Iowa 410, 26 N.W. 2d 39. 2 A.L.R. 2d 1108. Cert. den. 68 S. Ct. 151 10

Blackwell vs. Laird (Mo.) 163 S.W. 91 10

Burns vs. Wray Farmers Grain Co. (Colo.) 176 P. 487. 65 Colo. 425 19

Campbell vs. People, 72 Colo. 213. 210 P. 841 19

Citizens State Bank vs. Farmers Union Livestock Coop. (Kan.) 193 P. 2d 636 10

Colorado Wheat Growers Association vs. Thede 80 Colo. 529. 253 P. 30 19

Coombs vs. Burk (Cal. App.) 180 P. 59 14

First National Bank vs. Siman (S.D.) 289 N.W. 416 10

Gamco, Inc. vs. Providence Fruit & Produce Bldg., 1 Cir. 194. F. 2d 484. 344 U.S. 817. Cert. den. 73 S. Ct. 11 19

Garner vs. City of Aurora (Neb.) 30 N.W. 2d 917 15

International Salt Co. vs. United States 332 U.S. 392. 68 S. Ct. 11 ..... 17, 18

Johnson vs. People, 72 Colo. 213. 210 P. 841 19

Johnson vs. Robinson (5 Cir.) 203 F. 2d 135 11

Kelly vs. Lang (N.D.) 62 N.W. 2d 770 10

Kirk vs. St. Joseph Stockyards Company, 8 Cir. 206 F. 2d 283. 40 A.L.R. 2d 981 ..... 10, 12

Page

Kobe, Inc. vs. Dempsey Pump Co. (10th Cir.) 198 F. 2d 416 18

Mason City Production Credit Assn. vs. Sig. Ellingston Company (Minn.) 283 N.W. 713 10

Miller vs. Roswell Gas & E. Co. (N.M.) 166 P. 1177.. 16

Moderlie vs. Schmidt (Wash.) 108 P. 2d 331 10

Montana Meat Company vs. Missoula Livestock Auction Company (Mont.) 230 P. 2d 955 10

Nacogdoches Light & P. Co. vs. Thomas (Tex. C.A.) 138 S.W. 1080 14

Nashville Union Stockyards vs. Grissim, 153 Tenn. 225..280 S.W. 1019 ..... 13, 30

People vs. Pub. Service Com., 148 N.Y.S. 583..... 14

Producers L. Mktg. Assn. vs. U.S. and Benson (Opinion below) 241 F. 2d 195..... 2, 7, 8, 13, 14, 24, 25, 29, 30

Seaton Mtn. El. etc. Co. vs. Idaho Springs Inv. Co. (Colo.) 111 P. 834 16

S.E.C. vs. Ralston Purina Co., 346 U.S. 119. 73 S. Ct. 981 23

Seymour vs. Austin (D.C. Ore.) 101 F. Supp. 915.... 11

Sig Ellingson Company vs. Gutenbach (8 Cir.) 199 F. 2d 679. Cert. den. 73 S. Ct. 505 11

South Florida Railroad Co. vs. Rhoads, (Fla.) 5 So. 633 16

Stafford vs. Wallace (1922) 42 S. Ct. 397. 258 U.S. 495. 23 A.L.R. 229 ..... 2, 5, 9, 18, 20, 27, 29

State vs. Butte E. & P. Co. (Mont.) 115 P. 44..... 16

State vs. Citizen's Tel. Co. (S.C.) 39 S.E. 257..... 14

Strathie vs. Buck County El. Co., P.U.R. 1920-D, P. 290 14

Page

Sullivan vs. Wells (D.C. Neb.) 89 F. Supp. 317 10

Ten Broek vs. Miller (Mich.) 216 N.W. 385, 55 A.L.R. 768 16

Union Light and Power Co., P.U.R. 1932-B, P. 1 14

U. S. vs. Storer Broadcasting Company 76 S. Ct. 763 ..... 22, 24, 30

Vandenberg vs. Kansas City Gas Co. (Mo.) 105 S.W. 17 16

Walker vs. Caviness (Tex.) 256 S.W. 2d 880 10

Texts:

23 A.L.R. Note, 243 10

55 A.L.R. 771, Note 15

36 Am. Jur., Monopolies §3 17

36 Am. Jur., Monopolies §5 17

36 Am. Jur., Monopolies §6 17

36 Am. Jur., Monopolies §13 17

43 Am. Jur., Public Utilities §22 12

43 Am. Jur., Public Utilities §23 15

73 C.J.S., Public Utilities §7 ..... 12, 15

Packers & Stockyards Act, 1921

7 U.S.C. §201 12

7 U.S.C. §202 5

7 U.S.C. §205 ..... 6, 7, 9, 10, 19, 20, 25, 29

7 U.S.C. §208 ..... 6, 9, 10

7 U.S.C. §210 2

7 U.S.C. §211 ..... 21, 26

Federal Communications Act

47 U.S.C. §309 22

Hobbs Act

5 U.S.C. §1032 26

Sherman Act

15 U.S.C. §2 ..... 18, 30

IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

No. 917

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
Denver Union Stock Yard Company

QUESTION PRESENTED

A single question, only, is presented:[1]

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1. Respondent re-states the Question Presented, being "dissatisfied with (its) presentation by the other side". Rule 40(3).

"Is the Regulation here on trial, which was issued by Denver Union Stock Yard Company (a public utility[2]) illegal upon its *face* as a matter of law?"

The Court of Appeals held it was.

NOTE: The Regulation was *not issued or prescribed* by the Secretary or Department of Agriculture. They had no part whatever in its origin. It was issued by the Stock Yard.

The only part played by the Secretary or Department of Agriculture came *afterward* when Respondent (a "market agency") lodged a complaint (R. 40) with the Department of Agriculture against Petitioner (the Stock Yard Company) as permitted by the Packers & Stockyards Act (7 U.S.C. §210) charging the Regulation by the Stock Yard Company was illegal *per se*. The Department's Judicial Officer dismissed (R.33), but the Court of Appeals reversed, holding the Regulation to be void upon its *face* as a matter of *law*. (Petition for Certiorari, Appendix 8a.) 241 F. 2d 192.

Petitioner's presentation of the question in such self-evident negatives as being whether the Court of Appeals "could assume facts not in the record" or "invade the statutory discretion of the Secretary" (Petition for Certiorari, Page 3) will not do. The *Court* looked squarely at the Regulation and found it illegal upon its *face*. No facts were necessary, *assumed or not assumed*. The Stock Yard Company's handiwork was simply void, in and of itself. The Secretary has not employed or refused to employ discretion. And

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2. *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397, 258 U.S. 495. 23 A.L.R. 229.

when the Regulation collapsed of its own illegal force, it followed — had to follow — that the Stock Yard Company was not to be permitted to enforce it. And that exactly was the resulting order of the Court of Appeals. The Regulation was pronounced a *nullity;* and no discretion can be claimed from a resulting nullity.

The simple fact and situation is: This shocking Regulation issued by the Stock Yard Company has travelled a tortuous trail, finally coming to its own end. Respondent (complainant before the Secretary) there avowed that it stood squarely on the legal proposition that the Regulation was totally void upon its face. So it filed its "Election to Rest", relying wholly upon the law.[3] Petitioner, the Stock Yard Company (Respondent before the Secretary) then *also chose the law* as the sole deciding factor. For it promptly filed its "Motion to Dismiss", asserting therein that Respondent (complainant there) had failed —

> "to sustain the burden of making a prima facie case in support of its complaint *as evidenced by its election not to offer proof*" etc. (R. 74).

Thus, both sides called for a decision on the Regulation's validity or invalidity as a matter of law, *only.* Respondent did so by its "Election to Rest". Petitioner, by its "Motion to Dismiss". The Judicial Officer decided on the Regulation squarely as a matter of *law.* He held it was not invalid on its face. The Court of Appeals also decided on the Regulation as a matter

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3. "Complainant's Election to Rest" put the Regulation squarely to test as being illegal on its face as a matter of law, declaring the taking of evidence could have no part in determining a *law* matter. (R. 73).

of *law*. It unanimously ruled the Regulation *was* invalid in *law* upon its *face*.

So, Petitioner (itself) and Respondent both called upon the Judicial Officer of the Department of Agriculture for a decision on the Regulation's validity or invalidity as a matter of law; the latter by its "Election to Rest", the former by its "Motion to Dismiss" the complaint. The Judicial Officer decided — as a matter of law, and the Court of Appeals decided — also as a matter of law; the question — only question — each time being as presented at the outset herein:

> "Is the Regulation here on trial, which was issued by Denver Union Stock Yard Company (a public utility) illegal upon its *face* as a matter of law?"

STATEMENT OF THE CASE

In 1955 Petitioner, Denver Union Stock Yard Company, announced:

> "If you engage in business at this stockyard, you cannot engage in business in the country, or elsewhere, in Colorado (except approximately the East one-sixth thereof designated by County lines and highways) other than to route livestock to us."

That, in effect, is what the Stock Yard Company declared in its Regulation 10(c) of "Tariff No. 14" May 11, 1955 filed with the Secretary of Agriculture and addressed to "market agencies" (firms like Respondent — commission firms) and "dealers" (who buy and sell for themselves) and other persons operating on the Denver Stock Yard.

A private company may prescribe at will the conditions on which it will deal or *refuse* to deal with anyone. But not so the Denver Union Stock Yard Company. Why? Because of the Packers & Stockyards Act 1921 which makes a "posted stockyard"[4] a *public utility.*[5]

> "The (Packers & Stockyards) Act, therefore, treats the various stockyards of the country as *great national public utilities*". (Parentheses and emphases supplied.) *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397, 402.

The Packers & Stockyards Act provides:

> "It shall be the duty of every stockyard owner

4. Petition for Certiorari, Page 4. A "posted" stockyard is one which the Secretary of Agriculture has declared to be a "public market". 7 U.S.C. §202.

5. *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397. 258 U.S. 495. 23 A.L.R. 229.

and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . ." 7 U.S.C. §205.

"It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. §208.

Thus, the Stock Yard Company is commanded to (1) furnish stockyard services at its stockyard without discrimination, and, (2) establish and observe nondiscriminatory *regulations* and practices, discriminatory regulations being denounced as unlawful.

Nevertheless, the Stockyard Company owners, May 11, 1955, issued the Tariff and Regulation here on trial, declaring that all "market agencies", "dealers" and "other persons" engaging in business at this stockyard were *prohibited* from engaging in any of the following livestock activities in substantially the entire State of Colorado (except the East 1/6th):

(1) Soliciting business for other markets, — or for sale at outside feed yards, — or at country points.

(2) Diverting or attempting to divert livestock from this market which would otherwise come to the Denver Stock Yard.

(3) Engaging in any practice to interfere with the "normal" flow of livestock to the Denver Stock Yard.

Then followed a self-defined area prohibited to the "market agencies", "dealers" and "other persons" described by the Regulation as being

"all of the State of Colorado" except (approximately the East 1/6th thereof) outlined by designated boundaries and County highways. R. 3. 40-41. Petition for Certiorari, 2a, 11a. Opinion below, 241 F. 2d 194.

NOTE: The Regulation bars all market agencies, dealers, and other persons admitted on the Denver stockyard from soliciting or doing business or trading at all within the forbidden country area — substantially all of Colorado — *except* to route livestock to the Denver stockyard. It says those who handle livestock in that area must see that all stock handled by them moves to the Denver stockyard or they must get off of that yard and stay off.[6]

So Respondent (as a market agency operating at the Denver stockyard and other yards and in the country throughout the West) challenged the Regulation and filed its complaint with the Secretary of Agriculture. (R. 40) It set out that the stockyard was a public utility under the Packers & Stockyards Act, was, therefore, under duty to furnish stockyard services without discrimination[7] and the Regulation was discriminatory and should be set aside as unlawful, pointing out that its demand was no different than the demand of:

— A railroad which would deny service to a shipper who also shipped by truck.

— An airline which would deny service to passengers who also travel by rail.

— A power company which would deny service to one who also uses gas.

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6. As the Court of Appeals remarked, Respondent was "facing expulsion from the Denver yard" if it failed to abide the Regulation. 241 F 2d 195. Petition for Certiorari, 4a.

7. 7 U.S.C. §205.

> — A water company which would deny service to one who also receives water from a spring or purchases bottled water from another supplier . . . etc., etc. (R. 42.)

The Stock Yard Company answered, defending and asserting its right to so regulate. A "hearing examiner" made an "Interim Ruling", saying he thought a hearing should be set, and setting one. (R. 72). But, Respondent thought and claimed the matter was solely one of law — it always was.

So, at that point, Respondent filed its "Election to Rest" upon the Regulation's invalidity as a matter of *law* on its *face*. (R. 73). Petitioner also stood. It filed its "Motion to Dismiss" the complaint for Respondent's not having "sustained the burden of making a prima facie case as evidenced by its election not to make proof". (R. 74). Briefs and argument followed. The Order and Decision of the Judicial Officer (in the Department of Agriculture) dismissed the complaint. (R. 33). Respondent appealed to the Tenth Circuit Court of Appeals. The latter reversed, holding the Regulation to be "invalid upon its face". (241 F. 2d 197. Petition for Certiorari, 8a). The Stock Yard Company seeks review in this Court.

As we will see hereafter, the decision of the Court of Appeals was correct. The Regulation is invalid on its face. That is the sole question presented, as this brief showed in its opening pages.

ARGUMENT

1.

Denver Union Stock Yard Company Is A Public Utility.

As we have seen, the Packers and Stockyards Act 1921 provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . . " 7 U.S.C. §205.

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. §208.

Promptly after the Act went into effect, this Court sustained its constitutionality. *Stafford* vs. *Wallace* (May 1, 1922) 258 U.S. 495. 42 S. Ct. 397. 23 A.L.R. 229. This court held the business of the various stockyards of the country was affected with the public interest, which made them public utilities under the Act:

> "The Act, therefore, treats the various stockyards of the country as *great national public utilities* to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion." 42 S. Ct. 397, 402. (Italics added).

That made the "public-utility" feature final everywhere.[8] State and Federal courts abide:

Birmingham vs. *Rice Bros.*, 238 Iowa 410, 26 N.W. 2d 39, 2 A.L.R. 2d 1108. Cert. Den. 68 S. Ct. 151.
Kirk vs. *St. Joseph Stockyards Company*, 8 Cir. 206 F. 2d 283, 40 A.L.R. 2d 981.
Blackwell vs. *Laird* (Mo.) 163 S.W. 91.
Sullivan vs. *Wells* (D.C. Neb.) 89 F. Supp. 317.
Montana Meat Company vs. *Missoula Livestock Auction Company* (Mont.) 230 P. 2d 955.

Market agencies (Respondent is one) are public utilities, no less than the stockyards, for the Act requires them also to furnish stockyard services (buying and selling livestock on commission for others) "without discrimination" and to establish "non-discriminatory regulations"[9]. The public utility character of the stockyards and market agencies is acknowledged everywhere by the courts.

Birmingham vs. *Rice Bros.*, supra.
Citizens State Bank vs. *Farmers Union Livestock Coop.* (Kan.) 193 P. 2d 636.
Mason City Production Credit Assn. vs. *Sig Ellingson Company* (Minn.) 286 N.W. 713.
First National Bank vs. *Siman* (S.D.) 289 N. W. 416.
Moderie vs. *Schmidt* (Wash.) 108 P. 2d 331.
Walker vs. *Caviness* (Tex.) 256 S.W. 2d 880.
Kelly vs. *Lang* (N.D.) 62 N.W. 2d 770.

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8. The editors of A.L.R. made this simple annotation on the subject: "Note. The decision in the reported case (*Stafford* vs. *Wallace*) being the final authority upon the specific questions therein considered, renders annotation unnecessary". 23 A.L.R. 243.

9. 7 U.S.C. §205. §208.

Allen C. Driver, Inc., vs. *Wells* (Md.) 86 A. 2d 724.
Seymour vs. *Austin* (D.C. Ore.) 101 F. Supp. 915.
Johnson vs. *Robinson* (5 Cir.) 203 F. 2d 135.
Sig Ellingson Company vs. *Butenbach* (8 Cir.) 199 F. 2d 679. Cert. Den. 73 S. Ct. 505.

2.

Denver Union Stock Yard As A Public Utility Is Under Duty To Furnish Stockyard Services To Respondent And Others Without Discrimination.

43 Am. Jur. Public Utilities §22:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders . . . the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination . . . to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility."

The duty is a common law obligation aside from any statute.[10]

Stockyard companies are just like other public utilities as regards their duty to serve. Note the following statement by the 8th Cir. Judges in *Kirk* vs. *St. Joseph Stockyards Company*, 206 F. 2d 283:

> "Defendent as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers & Stockyards Act of 1921, 7 U.S.C. §201 et seq."

Denver Union Stock Yard Company is a public utility and must, therefore, furnish stockyard services to Petitioner and other market agencies and dealers.

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10. "The obligation is one implied at common law." 43 Am. Jur. Public Utilities §22. "This duty exists independently of statutes . . . Statutes providing affirmatively therefor are merely declaratory of the common law". 73 C.J.S. Public Utilities §7.

3.

The Stock Yard Company's Regulation Is Illegal For Demanding Exclusive Patronage By Respondent And Others As A Condition To Furnishing Them Stockyard Services. Public Utilities May Not Demand Exclusive Patronage.

The Court of Appeals below[11] quoted approvingly this passage from the Tennessee Court's decision "upon the legality of a comparable situation" some years ago:

> "Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires * * * the defendants to do all their business with complainant * * *." *Nashville Union Stockyards* vs. *Grissim*, (153 Tenn. 225, 280 S.W. 1019).

A Tennessee stockyard sued to enjoin a commission man from going on the yard, charging he was doing things "hurtful" to the company's business by "diverting"[12] business from its stockyard so that the yard was "denied" the right to handle the shipments. The case was heard and decided on the pleadings[13]

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11. 241 F. 2d 197.

12. Denver's Regulation says the same, viz., that no market agency, dealer or person may "divert or attempt to divert" livestock from this market. (R. 11, 12. Petition for Certiorari, 2a. Opinion below, 241 F. 2d 194).

13. Like our own case, no fact hearing was found necessary to decide the question of validity or invalidity of the attempt as a matter of law upon the face thereof.

and dismissed. In other words, the attempt to bar the commission man from the Nashville stockyard because he did business elsewhere (as this Regulation attempts to do)[14] was held illegal as a matter of *law* upon its *face*. And our Court of Appeals below approved and held likewise.

In other words, the demand of exclusive patronage made by the Nashville Stockyard Company (public utility) by those it served (as a condition to serving them) was ruled illegal on its face as a matter of law. Our Court of Appeals below acknowledged itself as being in "accord" with the "persuasive words" of the Tennessee Court and quoted therefrom the passage above.[15]

It is well settled that public utilities may not demand exclusive patronage as a condition to rendering service. The public utility, Denver Stock Yard Company, may not do so. *Strathie* vs. *Buck County El. Co.* *P.U.R.* 1920-D, P. 290. *Union Light and Power Co.* *P.U.R.* 1932-B, P. 1. *State* vs. *Citizen's Tel. Co.* (S.C.) 39 S.E. 257. *Nacogdoches Light & P. Co.* vs. *Thomas* (Tex. C. A.) 138 S.W. 1080. *People* vs. *Pub. Service Com.* 148 N.Y. S. 583. *Coombs* vs. *Burk* (Cal. App.) 180 P. 59.

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14. Our Court of Appeals below called it an attempt by the Stock Yard Company to "exclude from its yards those persons who lawfully trod upon its economic toes". 241 F 2d 196.

15. 241 F. 2d 196-197.

4.

The Stock Yard Regulation Denying Service To Those Who Deal In The Country — A Collateral Matter — Is Illegal. Public Utilities May Not Refuse Service Because Of A Collateral Matter Not Related To The Service.

As previously shown (P. 6) this startling Regulation bars from the Denver stockyard all who, in the forbidden area:

1. Solicit any business for other markets or for sale at country points, or endeavor to secure customers to buy or sell elsewhere.
2. Divert livestock away from the Denver yard (otherwise "normally" coming thereto).
3. Interfere with the "normal flow" of livestock to the Denver yard.

The Regulation's effect is this:

> *All who do business at our yard must do no business in the country area forbidden (other than to route livestock to us). Conversely: stay out of the forbidden country area (other than to route livestock to us) or get off of our yard and stay off!*

That is an attempt by a public utility to refuse service because of a collateral matter — doing business elsewhere (in the country).

> "The decisions are generally in accord in holding that a public utility corporation cannot refuse to render the service which it is authorized by its charter to furnish, because of some collateral matter not related to that service." 43 Am. Jur. Public Utilities §23.

See also 73 C.J.S. Public Utilities § 77. 55 A.L.R. 771, note. *Garner* vs. *City or Auroro* (Neb.) 30 N.W.

2d 917. *Vandenberg* vs. *Kansas City Gas Co.* (Mo.) 105 S.W. 17. *Ashline* vs. *Pub. El. L. Co.* (Vt.) 44 A. 2d 164. *South Florida Railroad Co.* vs. *Rhoads* (Fla.) 5 So. 633. *Ten Broek* vs. *Miller* (Mich.) 216 N.W. 385, 55 A.L.R. 768. *Seaton Mtn. El. etc. Co.* vs. *Idaho Springs Inv. Co.* (Colo.) 111 P. 834. *Miller* vs. *Roswell Gas & E. Co.* (N.M.) 166 P. 1177. *State* vs. *Butte E. & P. Co.* (Mont.) 115 P. 44.

5.

The Regulation Is Monopolistic And, Therefore, Illegal.

> "Monopolies in trade or business in this country . . . are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use." 36 Am. Jur. Monopolies §3.

Monopolies are condemned by the *common* law everywhere as contrary to public policy, aside from statute. 36 Am. Jur. Monopolies §5. And an arrangement, if it so much as *tends* to control a given market, will be denounced as a monopoly. The *pace* at which it tends to monopolize is of no consequence.[16] Every *arrangement*, the tendency of which is to stifle or unduly restrict legitimate competition is unlawful at common law and by anti-trust statutes, whether or not successful.[17] Complete monopoly is not the test; only does it *tend* toward monopoly.[18]

And so, in recognition, the Sherman Anti-Trust Act provides:

> "Every person who shall monopolize, or *attempt* to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

16. ". . . it is immaterial that the tendancy is a creeping one rather than one that proceeds at full gallop." *International Salt Co.* vs. *United States*, 332 U.S. 392. 68 S. Ct. 12, 15.

17. 36 Am. Jur. Monopolies §6.

18. Id. §13.

states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." 15 U.S.C. §2.

The receipt and handling of livestock at the Denver stockyard, a "posted" yard, and one of the "great national public utilities," constitutes interstate commerce. [19]

Look at this regulation: Its purpose is clearly revealed:

> **Monopoly.** To force all livestock sales by market agencies and dealers in Colorado (except the East 1/6th) to be made through the Denver Stockyard, or to gather tribute on them. Argument without end, that is its bald, bold purpose; to *capture*[20] the marketing of all livestock in Colorado (mostly) passing through the hands of those who may do any business on the Denver yard.

It is of no consequence that the Regulation does not attempt to blanket all livestock marketing *everywhere*. The Sherman Act prohibits monopolization of "any *part* of trade or commerce".[21] (If the Denver Company now prevails, will it extend the boundaries of the outside area forbidden to its customers so as to include Kansas? Or perhaps Arizona, New Mexico, Utah and Wyoming? Why not also Missouri, Texas and Ohio? Why not *all* of the United States?)

It is no answer that the market agencies and dealers are not barred from the country area involved, but only from the Denver stockyard if they *operate* in

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19. *Stafford* vs. *Wallace*, 42 S. Ct. 397.

20. *International Salt Co.* vs. *U.S.*, 332 U.S. 392, 68 S. Ct. 11, 15.

21. 15 U.S.C. §2. *Kobe, Inc.* vs. *Dempsey Pump Co.* (10th Cir.) 198 F. 2d 416, 423.

that country area. Freedom to operate in the country area cannot be foisted on the market agencies and dealers by the Stock Yard Company in *substitution* of their right to operate at the stockyard.[22] They, in law, have the right to operate both places. The Packers & Stockyards Act vouchsafes their right at the yard, making it the stockyard's duty to furnish stockyard services,[23] without regard to off-yard trading.

Monopolies are condemned by Colorado State law. A by-law of a farmers' grain association allowing members to sell their grain to a competitor *only* if they paid the association a penalty was held monopolistic and illegal.[24] The Colorado court said:

> "The tendency of the by-law to stifle competition is manifest." 176 P. 488.

See also *Campbell* vs. *People*, 72 Colo. 213, 210 P. 841 and *Johnson* vs. *People*, 72 Colo. 218, 210 P. 843, outlawing monopolies of plumbers and contractors. This Regulation tends to monopolize the marketing of livestock everywhere in the forbidden Colorado area by those who wish to deal at the Denver stockyard. For that monopolistic tendency, it is illegal and void.

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22. "Exclusion from an appropriate market or business opportunity is actionable notwithstanding substitute opportunities." *Gamco, Inc.* vs. *Providence Fruit & Produce Bldg.*, 1 Cir. 194 F. 2d 484. Cert. Den. 344 U.S. 817. 73 S. Ct. 11.

23. 7 U.S.C. §205.

24. *Burns vs. Wray Farmers Grain Co.* (Colo.) 176 P. 487 (1918). 65 Colo. 425. See also *Colorado Wheat Growers Association* vs. *Thede*, 80 Colo. 529, 253 P. 30.

6.

The Regulation Is Invalid On Its Face.

The Act requires this stockyard to furnish "stockyard services without discrimination". 7 U.S.C. §205. That makes it a "public utility".[25] Contrary to the right of public utilities to do so, its Regulation:

1. Demands *upon its face* exclusive patronage of those it serves.
2. Demands *upon its face* non-activity in the country area by those it serves (except to route their deals to Denver.)
3. Monopolizes and tends to monopolize *upon its face* the movement of all livestock handled in the forbidden country area by those it serves — requiring that they ship to Denver or stay off of the yard.

The Regulation, we submit, is clearly illegal upon its face.

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25. *Stafford* vs. *Wallace*, supra.

7.

The Regulation Being Illegal On Its Face, "Full Hearing" Required No Evidence.

Petitioner plays upon the words "full hearing", the Secretary being authorized in the Act to decide upon a regulation's invalidity "after a full hearing upon a complaint . . .". 7 U.S.C. §211. Petitioner claims lack of a full hearing.

But, again, look at the record:

— Respondent filed its Election to Rest, claiming the Regulation was void, *per se*. (R. 73).

— Petitioner countered with its "Motion to Dismiss" the complaint. (R. 74).

— The Department's Judicial Officer ruled. He upheld the Regulation. (R. 33).

Both parties at that point thus offered to settle for a decision on the Regulation upon its face. Neither can recede from that position now. And a "full hearing" was had on the question as a matter of law, thus:

— Oral arguments before a Hearing Examiner (previously). (R. 10).

— Briefs were submitted to him.

— The Examiner certified the proceeding to the Judicial Officer.

— Amicus Curaie filed briefs. (R. 11).

— The parties filed briefs.

— Oral arguments were finally made before the Judicial Officer April 30, 1956.

The court below said on this:

". . . It is fundamental to the law that the submission of evidence is not required to charac-

> terize 'a full hearing' where such evidence is immaterial to the issue to be decided."[26]

It might also have cited this court's expression on identical "full hearing" language in the Federal Communications Act[27] where evidence was ruled not to be involved — but a *waste* of time:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." *United States* vs. *Storer Broadcasting Co.*, 76 S. Ct. 763, 772.

Respondent, by its "Election to Rest" submitted its case upon the Regulation's being valid or invalid upon its face. *Petitioner*, by its "Motion to Dismiss" did likewise. Both thus settled for a decision on the Regulation upon its *face*. Petitioner, by its Motion to Dismiss, *abandoned* and *waived* any earlier request for an oral hearing. In fact, it was glad, of course, for the Judicial Officer's decision which thereupon granted its Motion to Dismiss. And no matter how unhappy it now finds itself with the decision by the Circuit Court of Appeals, Petitioner is *bound* by its Motion to Dismiss and the submission of its case thereon.

Petitioner's argument for a full hearing would require evidence upon a Regulation which, for example, would bar from the Denver stockyards:

1. Redheaded men, or,
2. Residents of Chicago or San Francisco, or,

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26. Citing this court in *Akron, C. & Y. Ry. Co.* vs. *U. S.*, 261 U.S. 184, 43 S. Ct. 270

27. 47 U.S.C. §309.

3. Stockholders of General Motors Corporation, or,
4. Stockholders of American Tel. & Tel. Co., or,
5. Members of the Republican Party, or,
6. Members of the Methodist Church, etc., etc.[28]

or a regulation which would say that no one at the Denver stockyards should:

— Sell milk cows if he drank powdered milk.

— Sell beef cattle if he also sold fish or poultry.

— Sell sheep with unshorn wool if he also dealt in cotton.

— Sell draft animals if he drove a truck, or

— Sell hide-animals if he wore synthetic shoe soles.

The invalidity of all of the foregoing rules would be apparent and self-evident on their face. Evidence would be "a waste of time".

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28. The first four examples were cited by the Supreme Court in *S.E.C.* vs. *Ralston Purina Co.*, 346 U.S. 119. 73 S. Ct. 981, 984.

8.

Petitioner's Complaints Against The Decision Of The Court Of Appeals Are Without Merit.

Full Hearing. That has already been disposed of, Page 21. The Court of Appeals rightfully observed:

> "Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a 'full hearing' for consideration of the limited contention made by the Petitioner in its complaint and by its election not to submit evidence." 241 F. 2d 196. Petition for Certiorari, 5a-6a.

But both sides submitted the Regulation upon its very face, viz., Respondent by its "Election to Rest"; Petitioner responding by its "Motion to Dismiss" the complaint. The *Morgan* case cited by Petitioner (P. 9) was simply upset by this court because of its weird procedure — the Secretary (who had taken office after the case was commenced and who heard none of it) made the decision in a proceeding conducted before another — his deputy (Rexford G. Tugwell). That was not full hearing. The other decisions cited are *rate* cases. We suppose, for the most part, rate cases require evidence. But, if a rate application showed upon its *face* as a matter of *law* that it was unwarranted, and then an "election to rest" and a response by "motion to dismiss" were filed, it would have to be decided without evidence. Taking evidence would be a "waste of time".[29]

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29. In the language of this court, *U.S.* vs. *Storer Broadcasting Company*, 76 S. Ct. 763, 772.

Unreasonableness Shown On Face. Petitioner now declares it was "prepared to show the evils at which this Regulation was aimed". But, prepared or not, Petitioner finally elected to *waive* that "preparation" and not to try to show anything by filing its "Motion to Dismiss" afte. Respondent had filed its "Election to Rest" upon the "evils" shown upon the face of the Regulation. In other words, both sides tested the "reasonableness" of the Regulation by the face thereof. The court below properly said the Regulation bears no reasonable "relationship to the duties required of the Stock Yard Company under . . . the Act."

No Hypothetical Facts Assumed By Court Of Appeals. The court below rightfully said that the Act required the market agencies (Respondent is one) to furnish stockyard services to customers at every yard where they operate. That was not hypothetical at all — but a true statement of law.[30] Then, reasoning, the Court of Appeals remarked also (of which Petitioner complains) that:

> ". . . by rendering . . . services . . . at one stockyard (the Denver yard) a marketing agency is prohibited (by the Regulation) from rendering . . . service . . . at another stockyard . . . (and, therefore) . . . the agency cannot perform its statutory duty in one regard or another." (Parentheses added.) 241 F. 2d 196. Petition for Certiorari 6a.

That was not hypothetical, but true reasoning. Market agencies admitted to the Denver yard must,

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30. "It shall be the duty of every stockyard owner and market agency to furnish . . . stockyard services." 7 U.S.C. §205.

under the Regulation, give up operations at all *other* yards (respecting Colorado livestock); conversely, market agencies admitted to other yards must give up operations at the *Denver* yard (respecting Colorado livestock), and, thus, they cannot perform their "statutory duty" in one regard or another, viz., at the Denver yard or at the other yards, as the case may be.

No Discretion Of The Secretary Invaded. Petitioner argues for the Secretary's discretion. But the Secretary has made no regulation. Petitioner (the Stock Yard Company) made it. The Secretary has not acted in a discretionary way. His only part was to hear a complaint against the Regulation. Had he *made* or *prescribed* the regulation, the argument might be closer to the mark. But he did not.

Petitioner also says the power of the Court of Appeals on review under the Hobbs Act (5 U.S.C. §1032) was to "enjoin, set aside, suspend (in whole or in part) or determine the validity of" the Secretary's decision — and no more; that it was the Secretary's function to prescribe the consequences, citing 7 U.S.C. §211. But this regulation was void *in toto* and *per se*. It collapsed of its own illegal weight. It was a *nullity*. As such, it could not be enforced at all. The Court of Appeals thus rightfully ordered its non-enforcement by directing the Secretary to order the Stock Yard Company to desist in trying to enforce it.

Petitioner would accord weight *inviolate* to the Judicial Officer's decision but none whatever to that of the Judges of the court below, pitilessly characterizing the latter as "knowing nothing of the problems

involved". (P. 13). But this case was presented, heard and decided throughout solely upon the face of the Regulation — a matter of law. Petitioner's argument would lead, then, to the shocking result that an employee (Judicial Officer) of the Department of Agriculture should be regarded as better qualified to decide upon the *law* than the learned Judges of the Court of Appeals.

Now, if we are to indulge in assumptions over qualifications to decide, by law, a Regulation over livestock and stockyards, etc., let us not overlook the Judges themselves who decided the case below,[31] whose lives and experiences have had their setting in the Great West —

> (where the) "flow of livestock (starts) from the ranges and farms of the West and the Southwest through the great stockyards . . . of that region". (Parentheses added). *Stafford* vs. *Wallace*, 42 S. Ct. 397, 401.

No Adverse Effect On Administration Of Act. Petitioner argues that the decision below will adversely affect administration of the Act. But this Regulation was not *issued* or *prescribed* by the Secretary but by the Stock Yard Company, itself. And had it been valid, the Secretary or Department of Agriculture would not be the ones to *enforce* or *administer* it. The Stock Yard Company would.

Were a regulation of the Secretary (and his administrative authority to regulate, enforce and *admin-*

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31. Hon. Walter A. Huxman, Kansas.
Hon. John C. Pickett, Wyoming.
Hon. David T. Lewis, Utah.

ister same) involved, the argument would be nearer the mark. But here is a Regulation by a stockyard itself. It is either valid or invalid on its face. If invalid, it falls of its own illegal weight and amounts to nothing, as the Court of Appeals ruled, and cannot be enforced by the stockyard. The result has no connection with administration of the Packers and Stockyards Act whatever.

CONCLUSION

A single question, only, is presented: the invalidity of this Regulation upon its *face* as a matter of *law*. That law question evolved definitely as the sole and only question in the case by the joint action of the parties: *Respondent's* "Election to Rest" on the invalidity as appearing by the face of the Regulation as a matter of law, and *Petitioner's* response in the form of its "Motion to Dismiss" the complaint for Respondent's "election not to offer proof". (R. 73, 74). The case was left and submitted for decision in that posture. The Secretary's ruling at that point upheld the Regulation, the Court of Appeals reversed.

Respondent submits:

1. The Stock Yard Company is a public utility.[32]

2. Its Regulation, on its face, demands exclusive patronage and also non-activity in the country area, by its customers (except to ship to Denver), as a condition to "furnishing them stockyard services". Such demands by public utilities are illegal[33] and the Packers and Stockyards Act 1921 will not permit them, for it makes it "the duty of every stockyard . . . to furnish . . . without discrimination . . . stockyard services". 7 U.S.C. §205. As the Court of Appeals said in quoting the "persuasive" Tennessee Supreme Court:

> "Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendent or his employer to transact all of their business of receiving, buying and selling live-

32. *Stafford* vs. *Wallace*, supra.

33. The Court of Appeals observed that the stockyard had no right to exclude those who "lawfully trod upon its economic toes". 241 F. 2d 196.

> stock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the Act which requires * * * the defendants, to do all their business with complainant, * * *." *Nashville Union Stockyards* vs. *Grissim*, supra (153 Tenn. 225. 280 S.W. 1019).

3. The Regulation is monopolistic — by the common law, the Sherman Act (15 U.S.C. §2) and Colorado State law.

4. The Regulation is void on its face as a matter of law. The parties each submitted the case on that single proposition — Respondent by its "Election to Rest", Petitioner by its "Motion to Dismiss". The Judicial Officer then decided on that question alone. The Court of Appeals did likewise. No evidence was necessary but would have "been a waste of time",[34] and the Appeals Court properly held the case was thus to be decided "upon the issues of law after according the parties the right of argument . . . and (this) constitutes 'full hearing' for consideration of the limited contention made". (Parentheses added). 241 F. 2d 196.

5. The foregoing propositions, viz., the demand of *exclusive* patronage and *non*-activity in the forbidden area, and *monopoly* — each of them illegal and shown upon the Regulation's face — were presented

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34. *United States* vs. *Storer Broadcasting Co.*, 76 S. Ct. 763, 772.

and argued at length in the Court of Appeals below. Its decision outlawing the Regulation was in accord.

The judgment of the Court of Appeals declaring the Regulation to be invalid upon its face as a matter of law and that the Stock Yard Company shall not be permitted to enforce it is correct. The Petition for Writ of Certiorari must be denied.

May, 1957.

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BRIEF OF RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT (INTRODUCTORY)	3
STATEMENT (POSTURE OF THE CASE)	6
STATEMENT (CONCLUDED)	9
SUMMARY OF ARGUMENT	15
ARGUMENT	19
1. DENVER UNION STOCK YARD COMPANY IS A PUBLIC UTILITY	19
2. DENVER UNION STOCK YARD COMPANY AS A PUBLIC UTILITY UNDER THE ACT IS UNDER LEGAL DUTY TO FURNISH STOCKYARD SERVICES TO RESPONDENT AND OTHERS WITHOUT DISCRIMINATION	23
3. THE STOCK YARD COMPANY'S REGULATION IS ILLEGAL FOR DEMANDING EXCLUSIVE PATRONAGE BY RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS AS A CONDITION TO FURNISHING THEM STOCKYARD SERVICES. PUBLIC UTILITIES MAY NOT DEMAND EXCLUSIVE PATRONAGE	25
4. THE STOCK YARD COMPANY'S REGULATION DENYING RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS STOCKYARD SERVICES BECAUSE OF THEIR COUNTRY OPERATIONS—A COLLATERAL MATTER—IS ILLEGAL. PUBLIC UTILITIES MAY NOT REFUSE SERVICE BECAUSE OF A COLLATERAL MATTER NOT RELATED TO THE SERVICE	31

TABLE OF CONTENTS—Continued

Page

5. THE STOCK YARD COMPANY'S REGULATION IS MONOPOLISTIC AND THEREFORE ILLEGAL 37

6. THE REGULATION IS INVALID UPON ITS FACE 46

7. SINCE THE REGULATION IS INVALID ON ITS FACE "FULL HEARING" REQUIRED NO EVIDENCE 48

8. AS SHOWN BY OUR OPPONENTS' BRIEFS, MARKETING AWAY FROM THE STOCKYARDS IS NOW OVER 40 PERCENT 54

9. PETITIONERS' AUTHORITIES EXAMINED AND FOUND WANTING 55

10. REGULATIONS AT OTHER STOCKYARDS ARE UNLIKE THE DENVER REGULATION 57

11. THE PRESENCE AND POSITION OF THE SECRETARY OF AGRICULTURE HEREIN IS ANOMALOUS 59

CONCLUSION 61

TABLE OF CONTENTS—Continued

Table of Citations

CASES: Page

Allen C. Driver, Inc. vs. Wells (Md.) 86 A. 2d 724 22

American Sumatra T. Corporation vs. S. E. C. (D. C. Cir.) 93 F. 2d 236, 239 51

Ashline vs. Pub. El. L. Co. (Vt.) 44 A. 2d 164 33

Birmingham vs. Rice, 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108. Cert. Den. 68 S. Ct. 151 20, 21

Blackwell vs. Laird (Mo.) 163 S. W. 91 21

Burns vs. Wray Farmers Grain Co. (Colo.) 176 P. 487 (1918) 42

Campbell vs. People (Colo.) 210 P. 841 43

Citizens State Bank vs. Farmers Union Livestock Coop. (Kan.) 193 P. 2d 636 21

Colorado Wheat Growers Assoc. vs. Thede (Colo.) 253 P. 30 (1927) 43

Coombs vs. Burk (Cal. App.) 180 P. 59 29

First National Bank vs. Siman (S. D.) 289 N. W. 416 21

Fort Worth Stock Yards Company vs. Brown (Tex.) 161 S. W. 2d 549 55

Gamco, Inc. vs. Providence Fruit & Produce Bldg., 1 Cir. 194 F 2d 484. Cert. Den. 344 U. S. 817. 73 S. Ct. 11 40

Garner vs. City of Aurora (Neb.) 30 N. W. 2d 917 32

International Salt Co. vs. U. S., 332 U. S. 392. 68 S. Ct. 12 37, 40, 41

Johnson vs. People (Colo.) 210 P. 843 43

Johnson vs. Robinson (5 Cir.) 203 F. 2d 135 22

Kelly vs. Lang (N. D.) 62 N. W. 2d 770 21

TABLE OF CONTENTS—Continued

	Page
Kirk vs. St. Joseph Stockyards Company, 8 Cir. 206 F. 2d 283. 40 A. L. R. 2d 981	20, 24
Kobe, Inc. vs. Dempsey Pump Co., 10 Cir. 198 F. 2d 416	40
Mason City Production Credit Assn. vs. Sig Ellingson Company (Minn.) 286 N. W. 713	21
Miller vs. Roswell Gas & E. Co. (N. M.) 166 P. 1177	34
Moderie vs. Schmidt (Wash.) 108 P. 2d 331	21
Montana Meat Company vs. Missoula Livestock Auction Company (Mont.) 230 P. 2d 955	21
Morgan vs. United States, 298 U. S. 468. 304 U. S. 1	53
Nacoghdoches Light & P. Co. vs. Thomas (Tex. C. A.) 138 S. W. 1080	28
Nashville Union Stockyards vs. Grissim, 153 Tenn. 225, 280 S. W. 1015	14, 25, 56, 61
Pennsylvania Railroad Company vs. International Coal Mines Company, 230 U. S. 184, 33 S. Ct. 893	48
People vs. Pub. Service Comm., 148 N. Y. S. 583	28
Rifle Potato Growers Coop. Assoc. vs. Smith (Colo.) 240 P. 937 (1925)	43
Seaton Mtn. El. etc. Co. vs. Idaho Springs Inv. Co. (Colo.) 111 P. 834	34
Securities and Exchange Commission vs. Ralston Purina Co., 346 U. S. 119, 73 S. Ct. 981	50, 52
Seymour vs. Austin (D. C. Ore.) 101 F. Supp. 915	22
Sig Ellingson Company vs. Butenbach (8 Cir.) 199 F. 2d 679. Cert. Den. 73 S. Ct. 505	22
South Florida Railroad Co. vs. Rhoads (Fla.) 5 So. 633	33

TABLE OF CONTENTS—Continued

Page

Stafford vs. Wallace, 258 U. S. 495, 42 S. Ct. 397, 23 A. L. R. 229 ..... 1, 4, 15, 19, 24, 39

State vs. Butte E. & P. Co. (Mont.) 115 P. 44 35

State vs. Citizen's Tel. Co. (S. C.) 39 S. E. 257 27

Strathie vs. Buck County El. Co., P. U. R. 1920-D, p. 290 27

Sullivan vs. Wells (D. C. Neb.) 89 F. Supp. 317 21

Ten Broek vs. Miller (Mich.) 216 N. W. 385, 55 A. L. R. 768 34

Union Light and Power Co., P. U. R. 1932-B, p. 1 27

U. S. vs. Morgan, 307 U. S. 83, 59 S. Ct. 795 36

United States vs. Storer Broadcasting Company, 351 U. S. 192, 76 S. Ct. 763 51

Vandenberg vs. Kansas City Gas Co. (Mo.) 105 S. W. 17 33

Walker vs. Caviness (Tex.) 256 S. W. 2d 880 21

Woerth vs. United States, 8 Cir., 231 F. 2d 821 56

RULES:

Rule 34(1) Revised Rules, Court of Appeals, 10th Circuit 59

Rule 40(3) Revised Rules, Supreme Court 2

STATUTES:

Federal Communications Act

47 U. S. C. A. §309 52

Hobbs Act

5 U. S. C. A. §1034 59

National Labor Relations Act

29 U. S. C. A. §160 59

TABLE OF CONTENTS—Continued

	Page
Packers & Stockyards Act, 1921	
7 U. S. C. A.	
§201	9, 20, 24
§202	9
§205	9, 15, 19, 20, 22, 27, 32, 46
§208	9, 15, 19, 20, 22, 46
§211	48, 59
§301 (a)	26
§304	26
Sherman Act	
15 U. S. C. A.	
§1	38
§2	16, 38, 45, 47
TEXTS:	
36 Am. Jur., Monopolies	
§3	37, 42
§5	37, 42
§6	38
§13	38
43 Am. Jur., Public Utilities, Etc.	
§22	21, 23, 27
§23	32
50 Am. Jur., Stockyards §4 (Supp.)	20
55 A. L. R. 771, Note	32
73 C. J. S. Public Utilities §7	23, 32
Greenhood on Public Policy, p. 180	29

BRIEF OF RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
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vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

QUESTION PRESENTED

"Is the Regulation here on trial which was issued by the Denver Union Stock Yard Company (a public utility[1]) illegal on its face as a matter of law?"

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[1] *Stafford* vs. *Wallace*, 258 U. S. 495, 42 S. Ct. 397.

That is the only question. The Court of Appeals agreed[2].

Respondent restates the question, as the Rule permits, "where a respondent is dissatisfied with (its) presentation by the other side".[3] The two parties (Secretary of Agriculture and the Stock Yard Company) are not agreed between themselves. Their statements of the question differ. (Case No. 106, Page 3. Case No. 118, Page 7). But, in his petition for certiorari here, the Secretary agreed with Respondent. He said:

> "* * * the issue for decision is * * * but only the narrow question as to whether the Regulations are, as to matter of law, invalid on their face." Secretary's Petition, Page 9.

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[2]It said: "The Regulation is invalid upon its face and the case is accordingly remanded." Etc. 241 F. 2d 197.

[3]Rule 40(3).

STATEMENT (INTRODUCTORY)

In 1955 Denver Union Stock Yard Company announced:

> "If you engage in business at this stockyard, you cannot engage in business in the country, or elsewhere, in Colorado (except approximately the East one-sixth thereof designated by County lines and highways) other than to route livestock to us."

That, in effect, is what the Stock Yard Company declared in a "Tariff No. 14" May 11, 1955 filed with the Secretary of Agriculture and addressed to *Market Agencies* (firms like Respondent who buy and sell on commission) and *dealers* (who buy and sell on their own account) operating on the Denver stockyard.

A private company may, of course, prescribe at will the conditions on which it will deal with customers. It may deal or refuse to deal with anyone. Or, it may deal with only those who patronize it *exclusively*. It may refuse to deal with anyone who does business elsewhere.

But not so the Denver Union Stock Yard Company. It is a "public utility". This is because of the Packers & Stockyards Act, 1921, as construed by the courts, governing "posted" stockyards (stockyards which the Secretary of Agriculture has determined to be "public markets" and has posted notice thereat accordingly).

Our case is that simple. Respondent, a market agency, is a non-stock marketing association comprised of farmer-members throughout the Western States. It has operated for its members many years at the Denver stockyards, at other stockyards throughout the West and in the country. Now this Stock Yard Company proposes to forbid Respon-

dent (and like agencies) from doing business the country area noted under pain of being expelled from the stockyard if it does. Respondent is offered a "Hobson's choice": "Stay out of that country area or off of our yards"!

If the Stock Yard Company can make good here, will it next expand the forbidden area—nudge its boundaries little by little or all at once into other States or even all over America? Will it forbid trading everywhere except on its own yards? One stock yard company has already done so. The stockyard owners at Los Angeles, with incredible aplomb, have forbidden trading everywhere except upon their own yards. Their "tariff" was taken haec verba from the Denver tariff here except no limited forbidden area was contained. It proscribes off-yard trading *everywhere*. Issued May 25, 1955—two weeks after Denver's—the Los Angeles tariff was promptly challenged (like the Denver tariff here) in a complaint before the Secretary of Agriculture and the proceedings are pending the outcome here.[4]

This case is eagerly watched by the stockyard companies and livestock industry throughout the land. Will the pattern of livestock marketing continue as before (at least as it has since 1921 when the Packers & Stockyards Act was passed), the stockyards of this country "as great national public utilities"[5] in promoting the flow of livestock being required to go on serving the industry and the public whether or not those dealing on the yards also deal elsewhere? Are the grower members of this and other farmer-owned associations to be denied a market for their livestock, through their own

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[4]*Producers Livestock Marketing Association* vs. *Los Angeles Union Stockyards Company*. U. S. Department of Agriculture. Packers & Stockyards Docket No. 2188:

[5]*Stafford* vs. *Wallace*, supra.

associations or chosen agencies, at the *stockyard* simply if the latter buy or sell or do business in the forbidden *country* —off-yard business? The answer must be given by this Court. It is of vast importance. Tradition is at stake. The issue is dramatic. We will literally see history in the livestock industry made before our eyes.

These pages are devoted to a showing that a regulation by a stockyard such as the Denver one, a public utility, which denies service to an agency simply for doing business elsewhere—in the country—is illegal upon its *face*. A public utility may not deny service to a customer for that reason. Such a regulation also is in restraint of trade and tends to *monopolize* trade or commerce in violation of the anti-trust laws. The Court of Appeals held the Regulation was invalid on its *face*. That holding was correct, as we shall see.

STATEMENT (POSTURE OF THE CASE)

The Stock Yard Company deprived *itself* of a hearing on the *facts* before the Secretary of Agriculture. Throughout the opposition briefs, it is charged that *Respondent* deprived the Stock Yard Company of a fact hearing by filing its "Election to Rest".[6] But, in response to Respondent's "Election to Rest", the Stock Yard Company then filed a Motion to Dismiss the complaint (R. 73). Thus, the case stood:

Respondent (Marketing Association)	Petitioner (Stock Yard Company)
Filed its "Election to Rest" (R. 72).	Filed its "Motion to Dismiss" (R. 73).
—This said the Regulation was illegal on its face as a matter of law; that Respondent would stand on that illegality as a matter of law; would not present evidence, such being unnecessary to determine the illegality as a matter of law, and that it thereby rested and submitted its case for final decision by the Secretary of Agriculture.	—This moved to dismiss the complaint with *prejudice* because of the Marketing Association's "failure" to sustain the burden of making a prima facie case "as evidenced by its election not to offer proof of its allegations" etc.

The Judicial Officer granted the Stock Yard Company's motion and dismissed the Market Agency's complaint.[7]

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[6]For example, American Stock Yard Company's brief, page 10, says: "Respondent's action (filing "Election to Rest") had the effect of preventing an evidentiary hearing". Same brief, see pp. 25, 30.

[7]The final order and decision of the Judicial Officer was "the complaint is dismissed" (R. 33).

The Stock Yard Company thus brought about the ruling appealed from, itself, i. e., the *dismissal*. It did this by filing its Motion for Dismissal.

The posture of the case became thus: the Market Agency (by its Election to Rest) submitted the case for decision on the Regulation's *invalidity* upon its face as a matter of *law*. The Stock Yard Company (by its Motion to Dismiss) submitted the case for decision on the Regulation's *validity* upon its face also as a matter of *law*. Both parties submitted the Regulation for a decision (without evidence) as to its validity or invalidity *as a matter of law upon its face*. Both thus conceded an evidentiary hearing was unnecessary. Neither wanted one. Whereas, the Stock Yard Company had previously answered, it then changed over and moved to dismiss. It next persuaded the Judicial Officer to grant its Motion to Dismiss. Naturally, it was pleased and willing to accept the dismissal it had brought about itself. But then the picture changed. The Court of Appeals reversed. It held the "Regulation is invalid upon its face" and the Stock Yard Company's Motion to Dismiss had been erroneously granted.

So, whereas the Stock Yard Company was most pleased to accept the favorable judgment made by the Department of Agriculture upon its Motion to Dismiss without a fact hearing, it now wants to reject the unfavorable judgment made by the Court of Appeals upon its Motion to Dismiss without a fact hearing.

The posture of the case remains unchanged throughout. Posture was fashioned by the parties in the proceeding before the Secretary. That posture—resulting by an election to rest and a motion to dismiss—carried over on appeal to the

Court of Appeals and carries over on appeal to the Supreme Court. It did not—could not—change along the way. The die was cast below. The posture of the case is immutable. Having put the case in posture before the Department of Agriculture, the Stock Yard Company must accept its own self-made posture throughout. Now is too late to argue for a fact hearing. The Stock Yard Company contended by its Motion to Dismiss that none was necessary—that the Regulation's validity could be determined as a matter of law upon its face. It cannot contend to the contrary on appeal.

The Stock Yard Company deprived itself of a fact hearing.

STATEMENT (CONCLUDED)

Denver Union Stock Yard Company owns and operates the Denver Union Stockyards, a "posted" stockyard under the Packers & Stockyards Act, 1921 (R. 11, 39). 7 U. S. C. A. §202. It is thus a "stockyard owner" under the Act. 7 U. S. C. A. §201.

Respondent, Producers Livestock Marketing Association, is a "market agency" as defined by the Act. Market agency means any person engaged in buying or selling in commerce at a stockyard upon commission basis (a commission firm) or furnishing stockyard services. 7 U. S. C. A. §201. Respondent has operated for many years on the Denver Stockyards, at other stockyards in the West, and also buys and sells in the country for livestock growers (R. 40).

The Packers & Stockyards Act, 1921, provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. * * *" 7 U. S. C. A. §205.

And:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. A. §208.

Thus, the Stock Yard Company is commanded to (1) furnish stockyard services at its stockyard without discrimination, and, (2) establish and observe nondiscriminatory

regulations and practices, discriminatory regulations being denounced as unlawful.

Nevertheless, the stockyard owners, on May 11, 1955, issued the following Regulation 10(c) contained in their "Tariff No. 14". (R. 39, 12):

"Item 10.

"Interference With Operations

"(a) * * *

"(b) * * *

"(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

"(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

"(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or

"(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

" 'The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

" 'The area lying East of the line beginning with the Westerly boundary of the County of Sedgwick where it intersects the Nebraska State line; thence South along the County line of

Sedgwick and Phillips Counties; thence West and South along the Western boundary of Yuma County to its intersection with U. S. Highway 36; thence West to Cope and South along Colorado Highway 59 to Eads, Colorado; thence Westerly along Highway 96 to Ordway; thence South on Highway 71 to Timpas; thence Southwesterly via Highway 350 to Trinidad; thence South to New Mexico State line.

" 'The provisions of Paragraph (c) do not apply on livestock solely used for breeding purposes.' "

The Regulation bars all market agencies (including Respondent) and others who are admitted on the Denver Stockyards from soliciting or doing business or trading at all within the *forbidden* country area noted (except to route livestock to the Denver Stockyard). It shows the gimlet eye of this stockyard owner to be squarely focused on all livestock traded or moving to market in that country area. It says those firms who handle livestock in that area must see that all stock handled by them therein moves to the Denver Stockyard or they must get off that stockyard and stay off. It meant, of course, that pending a judicial determination of Denver's right to issue the incredible rule, Respondent and others who had been admitted for years on the Denver Yard must discontinue their country sales and operations in the forbidden area (except to ship to Denver) or be *expelled* from the stockyard.

But Respondent refused to concede the Yard owners' right to *force* through their stockyards all livestock handled in the forbidden area by it and other market agencies and dealers. The stockyard is a public utility. It could not condition service to customers (including Respondent) on their

exclusive patronage. Public service companies may not demand that. Furthermore, the demand smacked of *monopoly* and restraint of trade.

So Respondent challenged the Regulation and filed a complaint with the Secretary of Agriculture July 7, 1955 (R. 39). Therein, Respondent, set forth the Regulation, explained that Respondent was a market agency, had operated for years on the Denver Stockyards, at other stockyards throughout the West and in the country, buying and selling for livestock growers; that the stockyard was a public utility under the Packers & Stockyards Act and required to furnish stockyard service without discrimination; that the Regulation was discriminatory and should be set aside as unlawful. The complaint went on to point out that the demand of the Regulation was no different than that of:

> —A railroad which would deny service to a shipper who also shipped by truck.
>
> —An airline which would deny service to passengers who also travel by rail.
>
> —A power company which would deny service to one who also uses gas.
>
> —A water company which would deny service to one who also receives water from a spring or purchases bottled water from another supplier * * * etc., etc. (R. 40, 41).

The complaint also explained that Respondent was a non-stock association comprised of members only, membership extending to growers throughout eleven Western States; it pointed out the Regulation forbade Respondent's buying, selling or taking consignments of livestock in the forbidden country area except for movement to the Denver Stock-

yards, or furnishing market advice to growers in the area other than to ship to the Denver yards—and no place else (R. 41). The complaint concluded with the request that the Regulation be set aside and annulled (R. 42).

The Stock Yard Company answered, defending the validity of the Regulation, asserting its right to so regulate and giving various reasons claimed to support its position (R. 44). A "Hearing Examiner" made an "Interim Ruling" December 6, 1955, saying he thought the problem required a hearing on "the facts". He set the matter for hearing (R. 70). To Respondent, however, the question was solely one of law. It elected to stand upon the Regulation's illegality as a matter of law. Therefore, it filed its "Election to Rest" (R. 72). This stated Respondent's position (1) that the Regulation was illegal and invalid on its *face* as a matter of law, (2) that Respondent elected to stand upon the illegality of the Regulation as a matter of law, and (3) would present no evidence, such being wholly unnecessary to determine the illegality of said Regulation as a matter of law, and, (4) wherefore, Respondent thereby rested and submitted its case for decision accordingly.

The Stock Yard Company filed a "Motion to Dismiss" for Respondent's failure to "sustain the burden of making a prima facie case as evidenced by its election not to offer any proof" (R. 73). The Hearing Officer *conceded* an oral hearing was no longer necessary.[8] But he thought the proceeding should be dismissed as demanded and certified the same to the "Judicial Officer" for decision, recommending dismissal.

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[8]His certification to the Judicial Officer said: "The oral hearing set for January 24, 1956 now seems unnecessary, and will not be held" (R. 73).

Briefs and argument followed. The decision and order of the Secretary of Agriculture was entered June 19, 1956 by the Judicial Officer acting for and on behalf of the Secretary. His decision and order was that the Regulation was not illegal upon its *face* and the complaint was dismissed. The Court of Appeals reversed (R. 77). Its decision is here for review.

The decision of the Judicial Officer was erroneous and that of the Court of Appeals is correct. The Appeals Court (quoting from a similar decision by the Tennessee Supreme Court)[9] held the Act did not require Respondent to do *all* of its marketing at the stockyard or prohibit Respondent from shipping livestock elsewhere. It ruled the Regulation invalid as a matter of law *upon its face.*

As we shall see, Denver Union Stock Yard Company, a public utility, may not demand that its customers (including Respondent) refrain from doing business elsewhere (except to ship to Denver) as a condition to receiving service on its stockyards. And such a regulation is in restraint of trade and tends to *monopolize* trade or commerce in violation of the Anti-Trust Laws.

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[9](R. 83—241 F. 2d 197). The Tennessee quotation: "Furthermore, we fail to find anything in the Packers & Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the Act which requires * * * the defendants to do all their business with complainant. * * *" *Nashville Union Stockyards* vs. *Grissim*, 153 Tenn. 225, 280 S. W. 1019.

SUMMARY OF ARGUMENT

1. Denver Union Stock Yard Company is a public utility because of the Federal Packers & Stockyards Act, 1921, requiring "posted" stockyards (like Denver's) to furnish "stockyard services without discrimination" and to observe "non-discriminatory regulations and practices" and denouncing non-observance as "prohibited and unlawful". 7 U. S. C. A. §205, 208. *Stafford* vs. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 23 A. L. R. 229.

2. The Stock Yard Company, as a public utility, is under legal duty to furnish stockyard services to Respondent and others without discrimination. This is so by the common law, as well as the Act itself.

3. The Stock Yard Regulation is illegal for demanding exclusive patronage of Respondent and other "market agencies" and "dealers" as a condition to furnishing them stockyard services. Public utilities may not demand exclusive patronage. An airline may not refuse service to one who travels by rail. A public power company may not deny service to one who also uses gas. A public water company may not deny water to one who also receives water from an adjacent spring, etc. Public utilities may not demand exclusive patronage. Yet this Regulation demands that all commission firms who do business at the Denver stockyard do all of their marketing of Colorado livestock (except livestock from the East one-sixth of Colorado) at the Denver yard. Such agencies may not buy or sell Colorado livestock elsewhere or they will be expelled from the Denver yard. The law is well settled that a public utility may not demand exclusive patronage. The demand renders the Regulation invalid.

4. The Regulation is illegal for denying Respondent and other agencies stockyard services because of their country operations—a collateral matter. It is well settled that public utilities may not refuse service because of a collateral matter not related to the service. Buying and selling livestock for members and customers away from the Denver stockyard by Respondent and others is collateral to, and has nothing to do with, their so doing at the Denver yard.

5. The Regulation is monopolistic and, therefore, invalid. This is both by the Sherman Act (15 U. S. C. A. §2) and the decisions of the Colorado Supreme Court. The Regulation is an attempt by the Stock Yard Company to *monopolize* the marketing of all livestock in Colorado (except the East one-sixth) and to *force* all such livestock through the Denver stockyard or gather *tribute* thereon.

6. The Regulation is invalid on its face. Its exclusive patronage demand, its refusal to furnish stockyard services to those agencies who deal elsewhere in Colorado livestock—a collateral matter, and its attempt to *monopolize* the marketing of all such livestock appear upon the *face* of the Regulation.

7. Since the Regulation is invalid on its face, "full hearing" required no evidence. Both parties submitted the Regulation for hearing before the Secretary of Agriculture upon its *face*. Respondent filed its "Election to Rest", saying therein the Regulation was invalid on its face. The Stock Yard Company then filed its "Motion to Dismiss", demanding dismissal of Respondent's complaint (to set aside the Regulation) because of Respondent's having elected to rest and failed to sustain the burden of "making a prima facie case" (R. 72, 73). Both sides thus submitted the Regulation

for decision in that posture—the validity or invalidity of the Regulation upon its face as a matter of law. The Secretary's Hearing Examiner concurred in that view. He said, "The oral hearing set for January 24, 1956 now seems unnecessary, and will not be held" (R. 73). Arguments and briefs by the parties (and Amicus Curaie) were heard and filed. The issues of law were fully argued on both sides and heard and determined by the Secretary. This constituted "full hearing", as the Court of Appeals properly decided.

8. As shown by brief of Amicus Curaie (American Stock Yards Association), over 40 percent of all livestock are now marketed in the country—away from a stockyard, as compared to 10 percent when the Packers & Stockyards Act was passed in 1921. The Regulation is simply an attempt to regulate against that economic fact and force back through the Denver stockyard that portion of said 40 percent which is now lost to it through country sales.

9. The Stock Yard Company's authorities do not support its claimed right to proscribe off-yard operations away from the stockyard by agencies which operate on its yards. The Fort Worth and Sioux City cases cited were simply examples of the right to regulate against offending activities (traffic jams and accosting drive-in loads) on the Fort Worth yard and the right of the Secretary of Agriculture to demand access to a "dealer's" records of cattle purchased *at* the Sioux City stockyard, notwithstanding the dealer's asserted transfer "by himself to himself" into a "special account" of the livestock; his so-called "special account" ordinarily covering livestock purchased in the country.

10. Alleged regulations at other stockyards are unlike the Denver one. Those regulations are not in the Record

but are *dehors*. Only *selected* portions of the alleged regu lations appear and are shown in the brief of Amicus Cura (American Stock Yards Association) who has journeyed fa afield of the Record. Those selected portions proscribe ac tivities only on the stockyard property or approaches. The do not attempt to proscribe activities in the country—awa from the stockyards—except for Los Angeles, Houston an Baltimore, perhaps, which were adopted after Denver's an were apparently inspired thereby.

11. The presence and position of the Secretary of Ag riculture here is anomalous. He was only the *forum* or *tri bunal* in the beginning. He was a party in the Court o Appeals *solely* because of a Rule of that Court (no statute requiring "the agency or officer concerned" to be name as a party-respondent on appeal. He is only a nominal party The real parties in interest are Respondent (complainan before the Secretary of Agriculture) and the Stock Yar Company (respondent before the Secretary of Agriculture) The Secretary did not make or issue the Regulation. Th Stock Yard Company did. The Secretary here is precisel in the position of a trial judge entering an appeal to argu for his decision made upon the trial.

ARGUMENT

1.

DENVER UNION STOCKYARD COMPANY IS A PUBLIC UTILITY.

The Packers & Stockyards Act, 1921 provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. * * *" 7 U. S. C. A. §205.

And:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. A. §208.

The Act went into effect August 15, 1921. It was tested forthwith for its constitutionality. The Supreme Court quickly upheld it May 1, 1922. *Stafford* vs. *Wallace*, 258 U. S. 495. 42 S. Ct. 397; 23 A. L. R. 229. Construing the Act, the Supreme Court held the stockyards are "great national public utilities":

> "The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion." 42 S. Ct. 402.

The Supreme Court's pronouncement settled the public-utility character of the stockyards once and for all. State and Federal courts abide:

Birmingham vs. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108. Cert. Den. 68 S. Ct. 151:

> "It may be here said that the specific provisions of the Act substantially accord with the common law rule applicable to public utilities in general."

Kirk vs. *St. Joseph Stockyards Company*, 8 Cir. 206 F. 2d 283, 40 A. L. R. 2d 981:

> "Defendant as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe, and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers and Stockyards Act of 1921, 7 U. S. C. A. §201 et seq."

50 Am. Jur., Stockyards, §4 (Supp.):

> "The duties imposed by the Federal Packers and Stockyards Act upon stockyard owners and marketing agencies are substantially in accord with the common law applicable to public utilities in general."

Market agencies (and Respondent is a market agency) are public utilities no less than the stockyards, for the obligation to furnish stockyard services "without discrimination" and to establish and observe "non-discriminatory regulations" is fixed upon "every stockyard owner *and* market agency" under the Act. 7 U. S. C. A. §205, §208.

Thus, Respondent and other market agencies, as public utilities, are under legal obligation to sell and handle livestock

on commission, consignment, etc., and to render their required services impartially and without discrimination to all who desire those services.[10] In fact, the juristic concept that they are public utilities enlivened judges in some instances in the past to actually decide that the market agencies are so irrefutably bound by the Act to handle livestock offered them for sale that they will be absolved from answering to the true owner or a mortgagee for selling stolen or mortgaged animals.

Blackwell vs. *Laird* (Mo.) 163 S. W. 91.

Sullivan vs. *Wells* (D. C. Neb.) 89 F. Supp. 317.

Montana Meat Company vs. *Missoula Livestock Auction Company* (Mont.) 230 P. 2d 955.

But that startling idea has been repudiated by the overwhelming majority of the courts in decisions like those below which concede that market agencies are public utilities but acknowledge their right nevertheless to reject stolen, mortgaged or other livestock wrongfully offered and hold them liable accordingly.

Birmingham vs. *Rice Bros.*, supra.

Citizens State Bank vs. *Farmers Union Livestock Coop.* (Kan.) 193 P. 2d 636.

Mason City Production Credit Assn. vs. *Sig Ellingson Company* (Minn.) 286 N. W. 713.

First National Bank vs. *Siman* (S. D.) 289 N. W. 416.

Moderie vs. *Schmidt* (Wash.) 108 P. 2d 331.

Walker vs. *Caviness* (Tex.) 256 S. W. 2d 880.

Kelly vs. *Lang* (N. D.) 62 N. W. 2d 770.

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[10]The obligation of a public utility exists as a part of the common law irrespective of statute. 43 Am. Jur., Public Utilities, Etc., §22.

Allen C. Driver, Inc. vs. *Wells* (Md.) 86 A. 2d 724.

Seymour vs. *Austin* (D. C. Ore.) 101 F. Supp. 915.

Johnson vs. *Robinson* (5 Cir.) 203 F. 2d 135.

Sig Ellingson Company vs. *Butenbach* (8 Cir.) 199 F. 2d 679. Cert. Den. 73 S. Ct. 505.

Respondent's complaint to the Secretary alleged (R. 40):

> "Denver Union Stockyards is in fact a public utility under the Act, required to furnish reasonable service 'without discrimination' and to 'establish, observe, and enforce just, reasonable and non-discriminatory regulations and practices * * .* (and) every unjust, unreasonable or discriminatory practice is prohibited and declared to be unlawful." 7 U. S. C. A. §205. §208.

The Secretary declared in his Finding No. 1 that Denver Union Stockyard was:

> "A stockyard posted as subject to the Act" (R. 11).

He referred in his Conclusions to the public-utility character of the stockyards thus:

> "A stockyard company is no doubt a public service company" (R. 27).

Denver Union Stockyard Company is a public utility under the Packers & Stockyards Act as construed by the courts. As such, it is under legal duty to serve Respondent and all market agencies and dealers at its stockyards, impartially and without discrimination, as we will now see.

2.

DENVER UNION STOCKYARD COMPANY AS A PUBLIC UTILITY UNDER THE ACT IS UNDER LEGAL DUTY TO FURNISH STOCKYARD SERVICES TO RESPONDENT AND OTHERS WITHOUT DISCRIMINATION.

43 Am. Jur. Public Utilities §22:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders * * * the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination * * * to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility."

The duty to serve is a common law obligation aside from statute:

> "This obligation is one implied at common law and need not be expressed by statute or contract, or in the charter of the public utility." Id.

C. J. S. says:

> "This duty exists independently of statutes regulating the manner in which it shall do business or of contracts with municipalities or individuals, and is imposed because the utility is organized to do business affected with a *public interest* and holds itself out to the public as being willing to serve all members thereof * * * statutes providing affirmatively therefor are merely declaratory of the common law." 73 C. J. S. Public Utilities §7.

The Supreme Court, remember, recognized the stockyard business was affected with a public interest under the Act:

> "The Act, therefore, treats the various stockyards of the country as great national public utilities * * * It assumes that they conduct a business affected by a public use of a national character and subject to national regulation * * *" *Stafford* vs. *Wallace*, 42 S. Ct. 397, 402.

Stockyard companies are just like other public utilities as regards their duty to serve. Here is a statement by the Eighth Circuit judges in *Kirk* vs. *St. Joseph Stockyards Company*, 206 F. 2d 283:

> "Defendant as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers and Stockyards Act of 1921, 7 U. S. C. A. §201 et seq."

Being a public utility, Denver Union Stockyard Company must furnish stockyard services to Respondent and other market agencies and dealers.

3.

THE STOCKYARD COMPANY'S REGULATION IS ILLEGAL FOR DEMANDING EXCLUSIVE PATRONAGE BY RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS AS A CONDITION TO FURNISHING THEM STOCKYARD SERVICES. PUBLIC UTILITIES MAY NOT DEMAND EXCLUSIVE PATRONAGE.

> "Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises (stockyard) *or* from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires * * * the defendant to do *all* their business with complainant * * *."[11] (Italics added.)

That was the Supreme Court of Tennessee speaking. *Nashville Union Stockyards vs. Grissim* (Tenn.) 153 Tenn. 225, 280 S. W. 1015. How like our own case! The Nashville Stockyard Company sued to enjoin a commission man from going on the yards. The complaint charged he was doing things "hurtful" to the stockyard company's business by "diverting"[12] business from its stockyards to other yards and shipping "to points other than Nashville"; or if he shipped to Nashville, doing so in a way the Yard Company was "denied" the right to handle the shipment.

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[11]The Court of Appeals below approved and quoted this statement of the Tennessee Supreme Court (R. 83. 241 F. 2d 197).

[12]Denver's regulation here uses the same language. It says no market agency, etc. may "*divert* or attempt to *divert* livestock from this market" (R. 39, 12.) P. 10 Supra.

The case was heard and decided on the pleadings (and a motion to dissolve a preliminary injunction). The complaint was dismissed by the trial court as being "without equity". In other words, the stockyard owner's attempt to bar the commission agent because he did business elsewhere was held illegal *as a matter of law upon its face.*[18] The Tennessee Court said also:

> "By §301(a) of the Act complainant is defined as a stockyard owner. By §304 of said Act it is made the duty of complainant to furnish to those engaged in shipping, buying, selling and handling livestock on its premises (stockyard) upon reasonable request, without discrimination, reasonable stockyard services. This is a duty which the Act imposes upon complainant, which it is bound to perform, and this is true as to all shippers, buyers, sellers and handlers of livestock on and through its premises. To this extent it is a public corporation and these duties cannot be disregarded."

As the decision showed, the Packers and Stockyards Act does not require one like petitioner (a Market Agency) to do all of its business on or through a stockyard. But the Denver Regulation does. What the Nashville stockyard owner was denied under the Act, the Denver owner proposes to accomplish nevertheless by his own regulation.

But demands by public utilities that their customers refrain from patronizing others or using other products or facilities have uniformly been stricken down as illegal. Such demands violate the very concept underlying the relation of

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[18] Here likewise the petitioner rested its case upon the validity of the Denver regulation as shown "upon its face as a matter of law" (R. 72).

such companies to the public: the duty to provide service without discrimination."[1]

Strathie vs. *Buck County El. Co.* P. U. R. 1920-D, p. 290. A druggist installed his own small lighting system using the power company's electricity only when necessary. *Regulation*: "The customer will not use on the above premises any electricity except that furnished by the company". *Decision*:

> "* * * a rule which requires a customer not to use any electricity except that furnished by the utility is unjust and unreasonable * * * it cannot refuse its service simply because the customer does not purchase all of his electricity from it."

Re: Union Light and Power Co. P. U. R. 1932-B, p. 1. *Regulation*: Steam for heating will be denied those who do not also buy the company's electricity. Interestingly, the excuse given was that the regulation was to prevent "further raids" on its business by a rival company. *Decision*: The regulation was invalid as permitting the utility to:

> "* * * thus discriminate in its services in favor of the class of persons who take its electric service as against the class of persons who do not take that service."

State vs. *Citizen's Tel. Co.* (S. C.) 39 S. E. 257. Local telephone company removed and cut off storekeeper's telephone on discovering that he was also using Southern Bell Telephone Company's service. *Regulation*: Customer will use local telephone service exclusively. *Decision*: Regulation invalid.

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[1] 43 Am. Jur., Public Utilities, §22. That concept pervades the Act. "It shall be the duty of every stockyard owner * * * to furnish * * * without discrimination * * * stockyards services * * *" 7 U. S. C. A. §205.

Nacogdoches Light & P. Co. vs. *Thomas* (Tex. C. A.) 138 S. W. 1080. Merchant used both electric power from power company and also his own gas in lighting his store. *Regulation*: Persons using power company's electricity for lighting must use no other kind of lights. *Decision*: Regulation invalid.

> "* * * Appellant had a * * * rule that persons using its lights must use no other kind of lights and claimed that appellee had violated this rule by putting in the system of gas lighting. * * * The effect of this rule if enforced can easily be seen * * * to drive one or the other of the systems out of business and to give the one remaining a *monopoly*. * * * If appellant had the right to impose this condition as to the use of gas it would have equally the right to impose it as to the use of kerosene lamps or candles and thus compel all of its customers to use its lights alone or do without its service entirely. Such a rule or regulation is *on its face unreasonable* and could not be enforced." (Italics added.)

People vs. *Pub. Service Com.* 148 N. Y. S. 583. Customer received electric power in day time from private plant next door. He operated large refrigerating system. He wanted electricty from power company at night only, but was refused. *Regulation*: "No other electric service introduced or permitted in connection with the equipment". *Decision*: Regulation invalid as arbitrary attempt to monopolize and contrary to public policy.

> "It is of course the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish. * * * In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of its service, but is a

purely arbitrary attempt on the part of the company to insure itself a *monopoly* of furnishing electrical current.

"* * * the restrictive clause which it insists on inserting in its contracts * * * is contrary to public policy and invalid and constitutes in no proper sense a reasonable regulation respecting the use of the service. * * *". (Italics added.)

Coombs vs. *Burk* (Cal. App.) 180 P. 59. Suit by Los Angeles Gas Company to recover money on contract. *Regulation*: The contract contained a provision requiring customer to buy gas range and equipment on loan from the gas company if customer quit using company's gas. *Decision*: Contract illegal. *Note*: *The* decision was that the complaint showed the illegality *as a matter of law upon its face.*

" 'Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful. Greenhood on Public Policy, p. 180.'

"Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* vs. *Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *West Va. T. Co.* vs. *Ohio R. P. L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Gwynn* vs. *Telephone Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; *Salt Co.* vs. *Guthrie*, 35 Ohio St. 672."

The rule is different as to private businesses:

"As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

The opinion concludes:

> "Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character (*Gibbs* vs. *Cons. Gas Co.*, supra), *and from a reading of the contract it is apparent* that its purpose in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in *restraint of trade*, but if upheld would tend to *stifle competition* and give plaintiff's assignor a *monopoly* of the business of furnishing a supply of gas in the city, and hence be *detrimental* to the public welfare, admits of no controversy." (Italics added.)

Denver Union Stock Yard Company (a public utility) may not demand the exclusive patronage of Respondent and other market agencies and dealers as a condition to furnishing them services at the stockyard. Its Regulation is void for such demand.

4.

THE STOCKYARD COMPANY'S REGULATION DENYING RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS STOCKYARD SERVICES BECAUSE OF THEIR COUNTRY OPERATIONS — A COLLATERAL MATTER — IS ILLEGAL. PUBLIC UTILITIES MAY NOT REFUSE SERVICE BECAUSE OF A COLLATERAL MATTER NOT RELATED TO THE SERVICE.

Item 10c of the incredible regulation at bar provides that no market agency (including Respondent) or dealer admitted on the Denver Stockyard shall "upon the company property *or elsewhere*" (R. 39, 12):

> "(1) Solicit any business for *other markets*, for sale at *country points*, or endeavor to secure customers to buy or sell *elsewhere*.
>
> "(2) Divert livestock otherwise 'normally' coming thereto, away from the Denver stockyard.
>
> "(3) Interfere with the 'normal flow' of livestock to the Denver stockyard.
>
> "Then comes a description by county boundaries and highways of the country area to which the prohibitory terms of item 10c apply (approximately five-sixths of Colorado)."

In other words, the effect of the Regulation is: If you do business at our stockyard you may not do business in the forbidden country area (except of course to route livestock to our stockyard). Conversely stated: Unless you stay out of this country area (except to route business to us) you must get off of our yards and stay off.

The authorities everywhere hold that a public utility may not withhold or refuse its service to a customer because of a *collateral matter* not related to that service:

> "The decisions are generally in accord in holding that a public utility corporation cannot refuse to render the service which it is authorized by its charter to furnish, because of some collateral matter not related to that service." 43 Am. Jur., Public Utilities §23.

To the same effect, see 73 C. J. S. Public Utilities §7. 55 A. L. R. 771, note.

The denial of the regulation here is based squarely on a collateral matter. The services which the Denver company is under duty "to furnish" are "stockyard services". 7 U. S. C. A. §205. The *basis* of its denial of those services is something else—entirely apart: Country sales and dealings (off-yard transactions) by its customers. *The services*: "Stockyard services". The *collateral matter*: Dealing in the country area proscribed.[15]

Garner vs. *City of Aurora* (Neb.) 30 N. W. 2d 917. City furnished both water and garbage collection. City Ordinance provided water would be cut off for non-payment of garbage fee. *The service*: Furnishing city water. *Collateral matter*: Non-payment of garbage fee. The Regulation was held invalid:

> "The authorities are uniform to the effect that a public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction not strictly connected with the particular

[15]This is aside from the Regulation's demand of exclusive patronage by its customers. Exclusive patronage demands by a public utility are illegal as already shown. P. 25 supra.

physical service. For instance, electric companies frequently sell electric stoves, refrigerators and the like. Such a company cannot cut off electric service because the patron is in default in the payment of a bill of that description * * *." (Quoting from *Thomas* vs. *Miss. Power & L. Co.*, 652 So. 169, 271.)

Vandenberg vs. *Kansas City Gas Co.* (Mo.) 105 S. W. 17. Held: Gas Company could not legally refuse to furnish gas to a woman unless she would pay her husband's delinquent gas bill at another property. *The service*: Furnishing gas. *Collateral matter*: Husband's delinquent gas bill at other premises.

Ashline vs. *Pub. El. L. Co.* (Vt.) 44A. 2d 164. Held: Power Company could not cut off electricity because customer refused to pay repair bill on electric refrigerator. *The service*: Electricity. *Collateral matter*: Non-payment of refrigerator repair bill. The court said:

> "* * * there is nothing in the statute directly or by implication that gives such public service corporations a right to refuse to furnish electric service to a customer in its territory because the customer is refusing to pay a bill for some collateral service such as repairing an electric refrigerator * * * Such is the law in this state and also other jurisdictions adding to the great weight of authority."

South Florida Railroad Co. vs. *Rhoads* (Fla.) 5 So. 633. The Railroad Company's rule prohibited employees of a competing steamship line from wearing caps and badges of the rival steamship company on the Railroad Company's trains. The employees actually solicited business for the steamship line on the railroad company's trains. *The service*: Railroad transportation. *Collateral matter*: wearing cap and badge

of a competitor while riding on the railroad train. The rule was held invalid. The head note reads:

> "A rule adopted by a railroad company which inhibited passengers on their trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers in connection with the company was not reasonable, and hence not binding on the public."

Furthermore, the illegality, the decision said, was strictly a matter of law:

> "The reasonableness of rules prescribed by railroad companies, and like corporations, with like powers, is a question of *law* to be decided by the courts and not a question of fact to be decided by juries." (Citing authorities.)

Ten Brock vs. *Miller* (Mich.) 216 N. W. 385. 55 A. L. R. 768. A resort company refused water and light to a customer unless he would install a septic tank. He refused. *The service*: Water and electricity. *Collateral matter*: Installation of septic tank. Held: Regulation was invalid:

> "The installing of a septic tank was purely a collateral matter, and had no relation to the duty of defendant company to furnish the light and water and receive its pay therefor."

Seaton Mtn. El. etc. Co. vs. *Idaho Springs Inv. Co.* (Colo.) 111 P. 834. An electric company's regulation refused steam for heating to those who did not also use its electricity. *The service*: Steam heat. *Collateral matter*: Purchase of electricity. Held: The regulation was invalid.

Miller vs. *Roswell Gas. & E. Co.* (N. M.) 166 P. 1177. Held, that a power company could not cut off electricity

from a customer's house because the customer's employee who signed the service contract for the customer owed an unpaid bill for wiring his own house—an entirely collateral matter.

See also *State* vs. *Butte E. & P. Co.* (Mont.) 115 P. 44. There the holding was that a power company could not refuse electricity to a customer for his alleged non-payment of gas charged to have been taken unlawfully by him.

Denial of stockyard services here is grounded by this arbitrary regulation entirely on a collateral matter having no connection with such services at all: Off-yard dealing in the country (without routing the business to the Denver stockyard.). That is wholly a collateral matter, just as much as those matters which were asserted to justify denial in the decisions above.

If Respondent, a Market Agency, undertakes to buy, sell or market for its many farmer-members (or other growers) livestock in the forbidden area it can do but one thing in that area: Ship to the Denver stockyard. Otherwise it will be expelled from that yard. It cannot ship to any other stockyard, for example, Oklahoma City, Omaha, Kansas City, St. Joseph or Chicago, even though it may do better price-wise for its members or patrons at those other markets. It cannot even sell livestock of one grower directly to another in that area. It must ship to Denver and back again to do so —a ludicrous process, to be sure, but one literally demanded by this shocking regulation. Respondent and other market agencies and dealers must, if the regulation be upheld, decide forever to stay with the stockyard and forego their country business in the area proscribed (other than shipping to Denver) or abandon the stockyard and work only in that coun-

try. If they stay with the stockyard they may not do business in that country area. On the other hand if they stay with the country area they may not receive or handle livestock therefrom at the Denver yard—for they will be expelled for selecting the country over the stockyard. But what of the Packers and Stockyards Act? It says the Denver stockyard owner must furnish stockyard service "without discrimination" and that "every unjust, unreasonable or discriminatory regulation and practice" is unlawful. But in the face of that statutory interdiction Respondent and those others will be denied service at the Denver yard regardless. Such "unjust, unreasonable and discriminatory" result was never intended by the Act. It was designed:

> "* * * to secure to patrons of stockyards the prescribed stockyard services at just and reasonable rates." *U. S.* vs. *Morgan*, 307 U. S. 183, 59 S. Ct. 795.

This Regulation flouts the very purpose of the Act.

5.

THE STOCKYARD COMPANY'S REGULATION IS MONOPOLISTIC AND THEREFORE ILLEGAL.

36 Am. Jur., Monopolies §3 says:

> "Monopolies in trade or business in this country * * * are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use."

The common law, aside from statute everywhere, condemns monopolies as being contrary to public policy. Id. §5.

An arrangement is monopolistic if it even *tends* to control a given market.

> "If it tends to control the given market, it unreasonably affects competition and prices to the detriment of the public and is obnoxious to both the common law and the anti-trust statutes. The question to be resolved is, then, whether the given arrangement or combination is injurious in any perceptible degree to the public or to any considerable portion of it, in tendency or effect." 36 Am. Jur. Monopolies, etc. §5.

The Supreme Court says the pace at which the tendency advances is of no consequence. It is enough that the arrangement *tends* to monopoly. *International Salt Co.* vs. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

Every arrangement tending toward stifling of competition is denounced by the anti-trust laws.

> "Stifling or Suppressing of Competition.—Every contract, combination, or arrangement of which the direct purpose, probable effect, or necessary *tendency* is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes. To be within the rule, it is not essential that the combination shall have been *successful* in suppressing competition; if the *tendency* of the arrangement has been to lessen competition in some degree, the conclusion is that it is unlawful." 36 Am. Jur. Monopolies, etc. §6. (Italics added.)

Furthermore:

> "All the authorities agree that in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly; it is sufficient if it really *tends* to that end, and to the deprivation of the public of the advantages which flow from free competition." Id. §13. (Italics added.)

The Sherman Anti-Trust Act denounces as illegal: "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states" etc. 15 U. S. C. A. §1. Also, every monopoly or *attempt* at monopoly, thus:

> "Every person who shall monopolize, or *attempt* to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *" 15 U. S. C. A. §2.

The receipt and handling of livestock by the Denver Union Stockyard Company, at its "posted" stockyards as

one of the "great national public utilities" constitutes interstate commerce. *Stafford* vs. *Wallace*, 258 U. S. 495, 428 S. Ct. 397. 23 A. L. R. 229.

With the foregoing observations in mind let us proceed to examination of the Regulation here. Remember it says in effect: If you do business at our stockyard you may not do business in the country except to route business in that area to our yards. In other words, if you do business in the country except to ship livestock to us you will be expelled from our yards. This Regulation limits and unreasonably restrains all market agencies, such as Respondent, and dealers in their operations at the Denver Stockyard (interstate commerce operations) by denying them "stockyard services" (which the Packers and Stockyards Act vouchsafes) if they perchance deal at all (even at the stockyard)[16] respecting livestock in the country area without shipping to Denver. The market agencies and dealers admitted on (and thus engaged in interstate commerce at) the Denver Stockyards cannot handle any livestock from the forbidden country area nor buy or sell in that area without shipping to the Denver Stockyard; nor may they sell or ship from that area to other stockyards — Omaha, Kansas City, St. Louis, Chicago, etc. — under penalty of being expelled.

Freedom of competition is gone. The market agencies and dealers may no longer serve their patrons in a free market; rather, they and their patrons (both patrons within and patrons without the forbidden area, as well) are denied access (through the market agencies and dealers) to the Denver Stockyard if those agencies do not accede to the unwhole-

[16]The proscription applies "*upon the company property* or elsewhere." (P. 10.)

some demand of this Regulation. On the other hand, if the market agencies and dealers bow to its restraint, *monopoly* prevails. The design of the Regulation is to "capture"[17] the market — the market of all livestock originating in the country area in nearly all of Colorado passing through the hands of all market agencies and dealers who may do business on the Denver Stockyards. The design is subtle and the stockyard owners will vigorously deny all monopolistic purposes or tendencies. But the Regulation speaks for itself. It is one of monopoly. Today, it travels at a snail's pace — it only "creeps".[18] But another day it may switch to a gallop. But whether it creeps or gallops the *tendency* is clear — monopoly is in the making, incipient monopoly is there. Its tendency is enough. *International Salt Co.* vs. *U. S.*, supra.

That the Regulation's monopoly does not blanket the entire livestock marketing industry is of no consequence:

> "The statute prohibits the monopolization of 'any part of the trade or commerce'." *Kobe, Inc.* vs. *Dempsey Pump Co.*, 10 Cir., 198 F. 2d 416, 423.

The Regulation's evictive threat over the market agencies and dealers on the Denver Stockyard is exactly like the one stricken down for its monopoly power in *Gamco, Inc.* vs: *Providence Fruit & Produce Bldg.*, 1 Cir. 194 F. 2d 484. Cert. Den. 344 U. S. 817, 73 S. Ct. 11. Gamco, a fruit and vegetable dealer, was evicted from a market building which provided market facilities for fruit and vegetable dealers. The building and facilities were served by interstate railroads. Gamco's lease contained a regulation prohibiting any transfer of interest in the business without the consent of the market

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[17] *International Salt Co.* vs. *U. S.*, 68 S. Ct. 12, 15.

[18] *International Salt Co.* vs. *U. S.*, supra.

owner. Gamco's stock changed hands on non-payment of a pledge. It was then evicted. It sued for reinstatement at the market and treble damages. The Court of Appeals (1st Circuit) ordered Gamco reinstated at the market with treble damages. The Supreme Court denied review.

The trial judge had upheld Gamco's eviction because competition continued on the market regardless. In reversing, Judge Clark said:

> "But there are other indicia of monopoly power, of which exclusion of competitors from the market is one, *International Salt Co. vs. U. S.*, 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20, which are condemned per se by §2, regardless of whether or not the position of dominance has been exploited to rig prices."

After extensive discussion the opinion on this subject concludes:

> "It is clear, from the various cases we have cited above, that exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities. * * *" (p. 488.)

Here Note: The produce market was *not* a public utility. The Denver Stockyard is.

The "substitute opportunity" offered by the Regulation here—freedom to deal at will in the country after the market agencies and dealers are excluded from the "appropriate market or business opportunities" of the Denver Stockyards —is no ameliorant. "Substitute opportunities" cannot be foisted upon a monopolist's victims.

This monopoly is condemned also by Colorado State Law. Remember, as we saw at the beginning of this chapter, monopolies are not denounced by Anti-Trust Statutes alone.

They were first condemned by the common law and remain repugnant in its eyes. 36 Am. Jur., Monopolies, etc., §3. §5. Any arangement which *tends* to stifle competition is unlawful by the common law. Colorado law denounces restraints and monopolies within its borders. In *Burns* vs. *Wray Farmers Grain Co.* (Colo.) 176 P. 487 (1918) the members of a farmer's grain association were allowed by a regulation in the by-laws to sell their grain to competitors in the Town of Wray *only* if they paid the Association a penalty. The Colorado Supreme Court held the by-law was in restraint of trade, explaining:

> "From the agreed statement of facts filed in this case the *tendency* of the by-law to stifle competition is manifest. It is practically impossible for a competitor of the plaintiff company in Wray to secure the patronage of the 230 existing stockholders in the grain company. * * * If these farmers do not want to sell their grain to their own company, they are allowed to sell to any competitor outside of Wray, but not to any competitor in Wray, unless they pay the penalty * * * it follows that they will not sell to a competitor in Wray unless they receive 1¢ or more per bushel more than what is offered by their own company. The competitor must offer this additional amount or else lose the business. The by-law if enforced, unquestionably would *tend* to drive out of business any other grain buyer in Wray and give the plaintiff company a monopoly. This effect renders the by-law unreasonable.
>
> "There is another feature of the by-law which makes it unreasonable. That is its restriction upon the stockholders themselves. They are restricted in their right to sell their product to whomsoever they please, and there is an absence of circumstances which render such restriction necessary for their own protection. According to the by-law, they are required

to sell to no grain buyer in Wray, which is their nearest and most convenient place of market, except to the Wray Farmers Grain Co. If they violate this agreement they are subject to the penalty prescribed in the by-law.

"The unreasonableness in the two respects above noted is due to the resulting injury to the public, which injury is *assumed* to exist or be inflicted under the circumstances of this kind according to the well-settled doctrines having to do with public policy." (Italics added.)

See also *Campbell* vs. *People* (Colo.) 210 P. 841 and *Johnson* vs. *People*, (Colo.) 210 P. 843 which outlawed monopolies of plumbers and electrical contractors.

True, exclusive patronage and penalty contracts between agriculturists and their associations (which were outlawed by the Colorado Supreme Court in the *Burns* vs. *Wray* case) are now valid in Colorado. But that was later brought about by a specific act of the Colorado Legislature approving that single class of restraints in 1923. See *Rifle Potato Growers Coop Assoc.* vs. *Smith* (Colo.) 240 P. 937 (1925). But the Colorado law still condemns monopolies and restraints except of the type specifically exempted by the remedial act above. See *Colorado Wheat Growers Assoc.* vs. *Thede* (Colo) 253 P. 30 (1927).

The arbitrary regulation spells only obstruction and restraint. Farmers and ranchers, the owner-members and patrons of Respondent and other market agencies in the forbidden area—and all other farmers and ranchers therein as well—are arbitrarily restricted and restrained in their opportunities for marketing their livestock. For this unwholesome regulation denies them marketing service through their own

market agencies or other agencies or dealers of their choice, except at Denver, if those agencies or dealers bow to its demand. On the other hand, if the agencies refuse to abide the regulation and decide to serve their patrons elsewhere, then the farmers and ranchers in the forbidden area may not, through their chosen agencies, go to market at the Denver yard because those agencies will have been evicted.

The result:

(1) Only those agencies who curtsy to the regulation and limit their marketing thereto will be allowed to take their patrons' livestock to the Denver Stockyard.

(2) Only those agencies who are willing to abandon trading on the Denver Stockyard will be allowed to take their patrons' livestock elsewhere to be marketed.

The first mentioned agencies will not vie for country sales or other markets for their customers under threat of reprisal by expulsion from the Denver Yard; while the second mentioned will not be able to market their patrons' stock at the Denver Yard because they will not be allowed to enter there. And thus a marketing pattern will emerge by which all livestock in the forbidden area will move in strict stereotype fashion—to Denver, only through the agencies who are willing to forget country operations on behalf of patrons except to ship to Denver; to other points and elsewhere, only through the agencies who are willing to forego operations for patrons at the Denver Yard. The livestock growers hitherto being free to direct their selected agents to take their product to Denver or to any other market—or even direct them to dispose of it directly in the forbidden area—will now have no such freedom. The class will be narrowed both

ways. They must choose only qualified agencies if they turn to Denver; only other agencies if they look elsewhere.

Furthermore, to the extent that it *forces* those market agencies and dealers who stay on at Denver to take their patrons livestock there, the Regulation monopolizes "that part"[19] of the business of marketing livestock and is unlawful.

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[19]The Sherman Act condemns monopoly or attempts at monopoly of "any part" of trade or commerce. 15 U. S. C. A. §2.

6.

THE REGULATION IS INVALID UPON ITS FACE.

We have seen that the Packers and Stockyards Act commands Denver Union Stockyard Company to furnish Respondent and other market agencies "stockyard services without discrimination" and declares that every unjust and "discriminatory regulation" is unlawful. 7 U. S. C. A. §205. §208. This in effect makes the Stockyard Company a public utility.

The Regulation in suit demands (1) the exclusive patronage of Respondent and all market agencies and dealers who are admitted on the Denver Stockyard, and, (2) forbids their dealing in the country area of Colorado other than to route their deals to the Denver Yard. But as we have seen (1) public utilities may not demand exclusive patronage by their patrons, nor, (2) deny them service because of some collateral matter not related to the service.

One look at the Regulation is enough. Its exclusive patronage demands are apparent *on its face*. Its denial of stockyard services to all market agencies and dealers who may unqualifiedly deal in the forbidden country area is likewise apparent *on its face*. That it *forces* all to whom it furnishes stockyard services to route their country business from the area noted to the Denver Yard is apparent *on its face*. Its announcement, as against the avowed public purpose of this act, that it will furnish stockyard services to handle the farmer's product on its way through that "great national public utility" to the consumers only if and when it is handled by an agency who agrees to send all of its patrons' prod-

ucts to Denver, is sardonic. Restraint and monopoly clearly show *upon its face*. The purpose of the stockyard owners to "monopolize or attempt to monopolize"[20] the movement of livestock from the forbidden area by this ingenious regulation is apparent *on its face*.

The regulation, we submit, is clearly illegal upon its face.

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[20]Sherman Act. 15 U. S. C. A. §2.

7.

SINCE THE REGULATION IS INVALID ON ITS FACE "FULL HEARING" REQUIRED NO EVIDENCE.

We wish to point out the Petitioners' (and their Amicus') misconception of the "full hearing" provision of the Act. It provides "Whenever after full hearing upon a complaint * * * the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary (may make a cease and desist order, etc.)". 7 U. S. C. A. §211.

We have seen already that the Regulation here, as shown upon its very face, is illegal for exacting (on its face) in behalf of the Denver public utility stockyard, exclusive patronage and consent to non-activity in the forbidden country area (a collateral matter) on the part of the market agencies and dealers whom the Act commands the Stock Yard Company to serve without discrimination; also, for its "attempt" (upon its face) to monopolize" the marketing of livestock contrary to the anti-trust laws of the United States and Colorado.

Being invalid on its face, no evidence was necessary. The Regulation could not have been "legalized" by any proof and no order by the Secretary could have made it valid.[21]

[21]"It could not have been legalized by any proof nor could the Commission by any order have made it valid." *Pennsylvania Railroad Company* vs. *International Coal Mines Company*. 230 U. S. 184. 33 S. Ct. 893, 896. Those were the words of the Supreme Court in rejecting a contention that a claim for partial rebate of freight rates should be submitted to the Interstate Commerce Commission for a *fact* hearing so as to allow that body to exercise its rate-regulating discretion because of the Railroad's practice of making similar rebates to other shippers.

Remember, both the Marketing Association and the Stock Yard Company submitted the Regulation for decision upon its *face*.[22]

The Marketing Association's "Election to Rest" said the Regulation was invalid upon its *face* as a matter of *law*, stating, consequently, that it would present no evidence (R. 72). The Stock Yard Company's "Motion to Dismiss" (R. 73) then demanded dismissal of the Marketing Association's complaint, *with prejudice*, contending the Regulation *was* valid in law upon its *face*, stating (in effect) that it, too, would not present evidence. The Secretary decided the case in that posture and upheld the Regulation on its *face*. The Court of Appeals accepted that same posture and found (as it was thus bound to do) that no fact issue existed and that "full hearing" had been accorded by a hearing of the Regulation on the law:

> "Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence" (R. 81-2): 241 F. 2d 196.

The face of the Regulation showed it was illegal. A full hearing on that was had as the Record shows (R. 10, 11):

—Oral argument before a hearing examiner.

—Briefs were submitted to him.

—Respondent filed its Election to Rest, submitting the case on the illegality as shown by the Regulation itself.

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[22]That was by the Marketing Association's "Election to Rest" and the Stock Yard Company's corresponding "Motion to Dismiss". That was the posture in which the case was decided. See P. 6.

—The Stock Yard responded with a Motion
Dismiss.

—The hearing examiner certified the proceedi
to the judicial officer.

—Numerous *amici curiae* were permitted to
briefs before that officer.

—The parties also filed briefs with him.

—Oral arguments were held before the judic
officer finally April 30, 1956.

In this posture, the full hearing requirement appl
only to the Regulation's invalidity as a matter of *law*. Bo
sides were willing to settle for that result. Respondent rest
The Stock Yard Company rested by its Motion to Dism
At that juncture, the uestion for decision was: validity
invalidity of the Regulation upon its face as a matter of la
A full hearing was held on that question. The Secreta
might decide either way. Whatever he thus decided, the f
hearing provision was fully complied with and exhaust
The Petitioners' erroneous position would require a heari
upon any and every Regulation, no matter how palpably
ridiculously illegal it might be. For example, that only
following should be admitted to do business on the Den
Stockyard:

—Redheaded men, or,

—Residents of Chicago or San Francisco, or,

—Stockholders of General Motors Corporati
or,

—Stockholders of American Tel. & Tel. Co.,[23]

—Members of the Republican Party, or,

—Members of the Methodist Church, etc., et

[23]The Supreme Court recently used examples 1 to 4 above in quot
from the 9th Circuit in *Securities and Exchange Commission* vs. *Rals*
Purina Co., 346 U. S. 119. 73 S. Ct. 981.

Would it be necessary to hold a hearing on facts about redheaded men, residents of Chicago or San Francisco, or stockholders of General Motors or American Tel. & Tel. Company? Of course not. No hearing could possibly add anything. In the words of the Supreme Court, it would be a "waste of time".[24]

Or, suppose the Stock Yard Company were to rule that no commission man could on the Denver Stockyard:

—Sell milk cows if he drank powdered milk,

—Sell beef cattle if he also sold fish or poultry,

—Sell sheep with unshorn wool if he dealt in cotton,

—Sell draft animals if he drove a truck, or

—Sell hide-animals if he wore synthetic shoe soles.

Petitioners contend even more. They argue the Court of Appeals' decision denouncing the Regulation upon its *face* is iniquitous for its effect, they predict, on rate-inquiry proceedings before the Department of Agriculture over the "reasonableness" of "rates" at stockyards. Apparently, their view is that in any and every "rate" case, resort to a *fact hearing* is necessary to determine "reasonableness" of stockyard rates and that a stockyard tariff fixing "rates" could never be "unreasonable" on its face. That illogical concept would lead to the ridiculous end that a tariff which might

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[24] *United States* vs. *Storer Broadcasting Company*, 351 U. S. 192. 76 S. Ct. 763, 772. See also *American Sumatra T. Corporation* vs. *S. E. C.* (D. C. Cir.) 93 F. 2d 236, 239, where it was said: "In such cases, it would be a waste of time to require one (a hearing)".

demand the following "rates" for stockyard services would require a fact hearing to determine its invalidity:

—One pair of cowboy chaps (or one "ten-gallon" cowboy hat or one pair of cowboy boots) for every 10 cows entering the stockyard.

—One cow for every 100 head of cattle entering the stockyard.

—One smoked ham for every 10 pigs entering the stockyard.

—One wool shirt for every 10 sheep sold at the stockyard.

—One riding saddle for every 10 horses sold at the stockyard.

—*Twice* the above rates to redheaded men, residents of Chicago or San Francisco, or stockholders of General Motors Corporation or American Tel. & Tel. Co.[25]

While the invalidity of such rules upon their face would be self-evident, Petitioners (and their amicus) would argue that a hearing and evidence should be had to establish the invalidity of such things. But that, of course, would be a "waste of time".

But we think the matter is at rest by the recent (May, 1956) decision of the Supreme Court construing identical "full hearing" language of the Federal Communications Act. *United States* vs. *Storer Broadcasting Co.*, 351 U. S. 192, 76 S. Ct. 763. That Act requires a "full hearing" on applications before the Federal Communications Commission. 47 U. S. C. A. §309. The Commission issued a rule relating to multiple ownership of broadcast stations which limited the

[25]To refer back to the Supreme Court's example adopted in *Securities & Exchange Commission* vs. *Ralston Purina Co.* P. 50, supra.

number in the hands of one owner. One broadcaster filed objections on the principal ground that the rule denied one person as many FM and television stations as standard stations. But the Commission upheld the rule. The Supreme Court affirmed. The broadcaster argued that the rule's denial could not become effective prior to a full hearing on his objection. But the Supreme Court said:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." 76 S. Ct. at page 772.

Here the Regulation is invalid on its face. Taking evidence when the result was clear from the beginning was wholly unnecessary. There was no "valid basis" for a hearing of evidence. It would have been a "waste of time". The full hearing provisions were met and satisfied, as the Court of Appeals ruled, by the hearing, arguments and briefs before the Secretary on that question of law. Cases cited by Petitioners are not in point.[26]

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[26]For example, *Morgan* vs. *United States*, 298 U. S. 468. 304 U. S. 1, was upset by this Court because of the startling procedure employed. The Secretary (who took office after the case was commenced and heard none of it) made the decision after his deputy (Rexford G. Tugwell) heard the evidence. That was *not* "full hearing".

8.

AS SHOWN BY OUR OPPONENTS' BRIEFS, MARKETING AWAY FROM THE STOCKYARDS IS NOW OVER 40 PERCENT.

The above shows the magnitude of the off-yard or country marketing of livestock nowadays. Brief of Petitioners' Amicus (American Stock Yards Association) shows a report by the Commitee on Agriculture, House of Representatives, 85th Congress, that while less than 10 percent of livestock were marketed or sold in the country when the Act was passed in 1921, now the amount exceeds 40 percent. In other words, nearly one-half of all livestock sales are now made away from the stockyards. (Amicus Brief, American Stock Yards Association, P. 24.)

This shows the tremendous effect this Regulation was probably designed to accomplish—to force back through the Denver yard most of the 40 percent of livestock sales in Colorado which are now made in the country.

9.

PETITIONERS' AUTHORITIES EXAMINED AND FOUND WANTING.

Reference should be made to two decisions which the Stock Yard Company claims support its position here—Fort Worth and Sioux City Stock Yard cases. At Fort Worth, a Texas intermediate appellate court (Texas Court of Civil Appeals) enjoined activities by defendants *not* out in the country away from the stockyard but actually in the alleys on the stock yard company property itself.[27] The Texas Court stated the stock yard company's complaint thus:

> "That defendants, against the will and over the protests of plaintiffs, persisted in going on plaintiff's property in said alley-way which leads to plaintiff's pens and docks, and there accosted drivers of trucks and loads of livestock on their way to plaintiff's pens, stopping said trucks and trailers in said driveway, and often buying said livestock before they reached plaintiff's pens; that when said trucks and trailers were so stopped, it caused a congestion of traffic and endangered life and property, since several hundred such trucks and trailers passed through said driveway each day" etc.

Continuing:

> "* * * that in many instances, defendants then and there in the midst of all said traffic and customers on their way to plaintiff's docks, would unload said livestock from the original owners' trucks and trailers to those of defendant's, thereby stopping traffic and increasing the inconvenience to plaintiff and its customers and patrons." *Fort Worth Stock Yards Company* vs. *Brown* (Texas) 161 S. W. 2d 549.

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[27]The opinion states the defendants were in fact trespassers on the Fort Worth Stock Yard property.

No one, we think, will contend against a stock yard company's right to preserve the peace and avoid traffic jams in the stockyards—throughout its alleys, pens and docks. But that is not to say that the Fort Worth Stock Yard Company could lawfully say to those who were admitted at its yard:

> "If you do business on our stockyard, you may not do business outside or in the country."

The Court of Appeals in our case held the Stock Yard Company could not do so. The Tennessee Supreme Court held likewise years ago.[28]

At Sioux City, the right of the Secretary of Agriculture to examine a "dealer's" books recording his receipts of cattle at that stockyard was upheld notwithstanding he had subsequently transferred the cattle to a "special account" of his "off-yard" operations. The Court of Appeals (8th Cir.) referred to that simply as:

> "* * * transferring such cattle from himself to himself."

and said the Secretary of Agriculture acquired jurisdiction over the dealer's activities in connection with the cattle—

> "* * * when they arrived at the Sioux City Stockyards * * * That jurisdiction was not and could not be divested simply by the making of entries reciting that they had been transferred to his 'special account'." *Woerth* vs. *United States*, 8 Cir., 231 F. 2d 821, 824.

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[28] *Nashville Union Stockyards* vs. *Grissim*, 153 Tenn. 225. 280 S. W. 1019. See Page 25.

10.

REGULATIONS AT OTHER STOCKYARDS ARE UNLIKE THE DENVER REGULATION.

Petitioners' Amicus Curaie (American Stock Yards Association) has traveled in a wide excursion outside and beyond the record here. Its brief contains a 30-page appendix of selected *portions* of alleged regulations at other stockyards. Examination shows only 3 as set out in that brief compare with Denver's Regulation, and that all of those were adopted *afterward*:[29]

Baltimore	—	August 8, 1955
Houston	—	July 15, 1955
Los Angeles	—	May 25, 1955[30]

Regulations adopted *after* the Denver one and not shown to have been litigated are obviously of no use in deciding the Regulation's validity. Apparently, we think, their authors must have taken their cue from Denver.

On the other hand, all other alleged regulations in the the brief (appendix) of Amicus, American Stock Yards Association (to the extent of the portions *selected* for quotation there) catalog themselves into a single pattern, provid-

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[29]The Denver Regulation was adopted May 11, 1955 (R. 39).

[30]American Stock Yards Association's brief is in error in stating the Los Angeles Regulation was February 10, 1957. The Department of Agriculture's records will show it was May 25, 1955. It is also on trial before the Secretary of Agriculture, awaiting the outcome of this case. *Producers Livestock Marketing Association* vs. *Los Angeles Union Stockyards Company*. U. S. Department of Agriculture, Packers & Stockyards Docket No. 2188.

The San Antonio Regulation applies only on the stockyard property.

ing, in substance, like Salt Lake City's (the home office of Respondent):

> "No market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming rail, truck, wagon or drive-in stock upon the streets adjacent to or upon the property of this Company prior to delivery into holding pens, without express permission." (Brief, American Stock Yards Association, Appendix, 24a.)

To the same effect, see: Cincinnati, Detroit, Fargo, Fort Worth, Milwaukee, Omaha, Peoria, Portland, St. Joseph, St. Paul, San Francisco, Sioux City, Sioux Falls and Wichita. (Brief of Amicus, American Stock Yards Company.)

The few regulations like Denver's (Baltimore, Houston and Los Angeles) came *after* the Denver one. (Los Angeles' is in litigation, as we have shown, before the Secretary of Agriculture. See P. 4 herein.) The other two have not been tested. Other regulations cited by the Amicus (American Stock Yards Association) are altogether unlike Denver's.

11.

THE PRESENCE AND POSITION OF THE SECRETARY OF AGRICULTURE HEREIN IS ANOMALOUS.

The Secretary of Agriculture did *not* issue or prescribe the Regulation on trial. It was issued by the Denver Union Stock Yard Company.

The Secretary of Agriculture did *not* file or initiate any complaint or proceeding thereunder. This Respondent (Producers Livestock Marketing Association) did.

This was a private two-party action between two litigants—Producers Livestock Marketing Association, complainant (plaintiff) in the complaint before the Secretary, and Denver Union Stock Yard Company, respondent (defendant) in that complaint.

This is *not* a case where a Government officer or agency issued a complaint or seeks enforcement.[31]

The Secretary of Agriculture got into this case as a *forum* or tribunal only. He was made a party on appeal to the Court of Appeals only because the rules of that Court required it.[32] Otherwise, he would have been left out, for the Hobbs Act (governing appeals from the Secretary of Agriculture to a Court of Appeals) provides that only the United States shall be the respondent on appeal.[33]

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[31]For example, not like the National Labor Relations Board's issuing a complaint for unfair labor practices. 29 U. S. C. §160. Nor did the Secretary, himself, commence this case "on his own initiative", as permitted by the Packers & Stockyards Act. 7 U. S. C. A. §211. *Respondent* filed the complaint before the Secretary.

[32]Rule 34(1) Revised Rules, Court of Appeals, 10 Cir. "In each case, the agency * * * or officer concerned shall be named as respondent."

[33]"The action in Court (of Appeals) shall be brought against the United States." (Parentheses added.) 5 U. S. C. A. §1034.

But now the Secretary—the *forum* or *tribunal*—appeals. He was only a *nominal* party in the Court of Appeals; joined only because of a Rule of that Court.

Actually, this is still simply a private, two-party suit between the original litigants—Producers Livestock Marketing Association and Denver Union Stock Yard Company. The presence and position of the Secretary of Agriculture in this case is entirely anomalous.

CONCLUSION

By now, the purpose of the Stock Yard Company's startling Regulation must be obvious to this Court—*Monopoly.*

> To force all livestock sales by market agencies and dealers in Colorado (except the East one-sixth) to be made through the Denver Stockyard or to gather *tribute* on them.

Argument without end, the design for monopoly stands out in bold relief against all the explanations and excuses the Stock Yard Company can make.[34]

Years ago at Nashville, the stock yard owners tried without success to rule off a commission firm for doing business outside the stockyards. It was "diverting"[35] business from the yards and that was "hurtful"[36], it was charged. But the Tennessee court "found nothing in the Act" requiring one to do all his business on a stockyard. *Nashville Union Stockyards* vs. *Grissim* (Tenn.) 153 Tenn. 225, 280 S. W. 1015. (See pp. 14, 25 herein.)

Now, at Denver the stockyard owners have determined to succeed where Nashville failed. The substance of their purpose — *monopoly* — is still the same. They have only changed its form. Their design is subtly cloaked by Regulation where Nashville's was unclothed in that respect. If

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[34]The Court of Appeals declared the Regulation "unlawfully * * * wounds the public interest" (R. 83). 241 F. 2d 196.

[35]The Denver Regulation uses the same language. It says no market agency, etc. may "*divert* or attempt to *divert* livestock from this market" (R. 39). P. 10, supra.

[36]In our case, the Court of Appeals below observed that the Denver Stock Yard Company may not exclude agencies from the yard simply because they may "lawfully trod upon its economic toes" (R. 82). 241 F. 2d 196.

Denver's Regulation is upheld by this Court, its success, we submit, will surely incubate an outbreak of similar regulations at all the stockyards throughout the United States. Los Angeles has already regulated, as we saw earlier in this brief (P. 4).. There will be nothing to stop the others. The vast number of livestock growers and farmers who have long comprised and patronized Respondent and similar livestock marketing organizations will be denied the service of their chosen agencies at the stockyards wherever those "great, national public utilities" determine to ban agencies for off-yard trading. That, we submit, is against the salutary purposes of the Packers & Stockyards Act which makes it the duty of every stockyard owner to furnish stockyard services "without discrimination" and denounces as unlawful "every unjust, unreasonable and discriminatory regulation and practice".

Respondent, Producers Livestock Marketing Association, submits:

1. The Stock Yard Company as a public utility is under duty to furnish Respondent and other market agencies and dealers stockyard services without discrimination.

2. The Regulation is illegal for demanding the exclusive patronage of those agencies and dealers.

3. The Regulation is illegal for denying stockyard services to those agencies for dealing in the country area—a *collateral* matter which will not justify denial by a public utility.

4. The Regulation is illegal for being *monopolistic*, "tending" and "attempting" to monopolize the marketing, by the market agencies and dealers who do business at the

Denver yard, of livestock originating in the forbidden area, contrary to the laws of the United States and the State of Colorado.

5. The Regulation is invalid upon its face.[37] Since its invalidity is thus apparent, a "full hearing" required no evidence to establish that it was illegal. "Full hearing" was required only upon the "issues of law",[38] resulting by Respondent's "Election to Rest" and the Stock Yard Company's "Motion to Dismiss", as the Court of Appeals properly held.

6. Decisions cited by the Stock Yard Company—Fort Worth and Sioux City—are not in point. At Fort Worth, *trespassers* were enjoined from jamming the alleys and ways on the stockyard property and from there "accosting" drive-in loads of cattle and taking them away. At Sioux City, a "dealer" was ordered to submit (to the Secretary of Agriculture) his records of livestock purchased at the yard (which gave the Secretary jurisdiction originally). The records were not immune from official scrutiny, it was held, simply by the dealer's transferring the purchased cattle "from himself to himself" in a "special" off-yard account. (See P. 56.)

7. Regulations at other stockyards differ vastly from the one on trial. Their proscriptions are against offending activities carried on at the yard—in the stockyard ways, alleys and pens, or along approaches to the yard. The few regulations (like Los Angeles still on trial before the Secretary of Agriculture) having similarity to Denver's came *after* the Denver one and appear to have been inspired by it.

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[37]For examples of rules and regulations by utilities showing *exclusive* patronage demands and *monopoly* upon their face (and stricken down by the courts), see pages 27-30 herein.

[38]Opinion below (R. 81). 241 F. 2d 196.

8. The presence and position of the Secretary of Agri culture on this appeal is anomalous. He got into the cas only as a forum or tribunal and remains simply *per force* o a Rule of the Court of Appeals requiring that he be name as party in that Court. His presence here is purely *nomina* The *real* parties in interest are Respondent, Producers Live stock Marketing Association, and Petitioner, Denver Unio Stock Yard Company.

9. The judgment of the Court of Appeals holding th Regulation to be illegal and invalid upon its face as a matte of law, and reversing the decision of the Secretary, is correc and must be affirmed.

November, 1957.

Respectfully submitted,

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SUPREME COURT, U.S.
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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1956

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
The statutory provisions and administrative regulations	3
Statement	5
Reasons for granting the writ	10
Conclusion	24
Appendix A (Opinion below)	25
Appendix B (Judgment)	34

CITATIONS

Statutes:

Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*):	
5 U. S. C. 1952 ed. § 1039 (a)	22, 23
5 U. S. C. 1952 ed. § 1040	1, 2
Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*):	
7 U. S. C. 1952 ed. § 201 (a)	4
7 U. S. C. 1952 ed. § 201 (b)	3, 10
7 U. S. C. 1952 ed. § 201 (c)	3
7 U. S. C. 1952 ed. § 201 (d)	4
7 U. S. C. 1952 ed. § 202 (a)	3
7 U. S. C. 1952 ed. § 203	3
7 U. S. C. 1952 ed. § 205	4, 5, 10, 17, 21, 22
7 U. S. C. 1952 ed. § 208	4, 5, 10
7 U. S. C. 1952 ed. § 211	4, 23
7 U. S. C. 1952 ed. § 228	5
28 U. S. C. 1952 ed. § 1254 (1)	1

Cases:

Associated Press v. *Labor Board*, 301 U. S. 103	17, 18
De Vries v. *Sig Ellingson & Co.*, 100 F. Supp. 781 (*D. Minn.*)	19, 20
Denver Union Stock Yard Company v. *Producers Livestock Marketing Association*, October Term, 1956, No. 917	6

Cases—Continued

	Page
Farmers Union Livestock Ass'n v. *St. Paul Union S. Co.*, 97 F. Supp. 539 (D. Mont.)	20
Federal Comm'n v. *Broadcasting Co.*, 309 U. S. 134	23
Federal Power Com. v. *Idaho Power Co.*, 344 U. S. 17	23
Ford Motor Co. v. *Labor Board*, 305 U. S. 364	23
Fort Worth Stockyards Co. v. *Brown* (Tex. C. C. A.) 161 S. W. 2d 549	20
Kelly v. *Union Stockyard & Transit Co. of Chicago*, 190 F. 2d 860 (C. A. 7)	20
Montana-Dakota Co. v. *Public Serv. Co.*, 341 U. S. 246	19
Sugar Institute v. *United States*, 297 U. S. 533	18
Swift & Co. v. *United States*, 343 U. S. 373	19
United States v. *Trucking Co.*, 310 U. S. 344	19
Miscellaneous:	
9 CFR Cum. Supp. § 201.1 *et seq*	5
9 CFR Cum. Supp. § 201.63	21
9 CFR § 202.5 *et seq*	5
9 CFR § 202.6 (b)	56
Dougherty v. *Union Stock Yard & Transit Co.*, 13 Agr. Dec. 239	20
Farmers Union Livestock Ass'n v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026	20
10 F. R. 13769	8
11 F. R. 177A–233	8
18 F. R. 3219, 3648	8
19 F. R. 74	8
Flynn v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14	20
Marketing, Yearbook of Agriculture, 1954	20
Producers Livestock Marketing Association v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188	11
Regulations Issued by Stockyard Owners:	
Billings Public Stockyards, Billings, Montana, Tariff 5	11, 13, 14
Bourbon Stock Yard Co., Louisville, Ky., Tariff 17	13, 14
Brighton Stock Yards Co., Brighton, Mass., Tariff 2	11, 14
Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7	13, 14
Farmers National Stock Yard Co., Muncie, Ind., Tariff 2	15
Fort Wayne Union Stock Yards Co., Tariff 6	14
Fort Worth Stockyards, Tariff 7	11, 13, 14

Miscellaneous—Continued

Page

Regulations Issued by Stockyard Owners—Continued
Greater Little Rock Stockyards, Tariff 1 ..... 12, 13, 14
Jonesboro Stockyards, Inc., Jonesboro, Arkansas, Tariff 2 ..... 10, 13, 14
Kansas City Stock Yards Co., Tariff 12 ..... 10, 11, 14, 15
Los Angeles Union Stockyards Co., Tariff 16 ..... 10, 11, 13, 14
Milwaukee Stockyards, Tariff 3 ..... 12, 13, 15
Mississippi Valley Stockyards, St. Louis, Missouri, Tariff 8 ..... 12, 15
Nashville Union Stock Yards, Inc., Tariff 9 15
Oklahoma National Stock Yards Co., Tariff 12 ..... 13, 15
Old Union Stockyards Co., Spokane, Washington, Tariff 9 ..... 12, 13, 15
Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2 ..... 12, 13, 15
Pittsburgh Joint Stock Yards Co., Tariff 6 ..... 12, 13, 15
Port City Stock Yards Co., Inc., Houston, Texas, Tariff 4 ..... 12, 13, 14
Portland Union Stock Yards Co., Tariff 19 ..... 12, 13, 15
Richmond Union Stock Yards Co., Tariff 9 ..... 12, 13, 15
Salt Lake Union Stock Yards, Tariff 8 ..... 12, 15
Seattle Union Stockyards Co., Tariff 1 15
Sioux Falls Stock Yards Co., Tariff 11 ..... 12, 13, 15
South Memphis Stock Yards Co., Tariff 11 ..... 12, 13, 15
South San Francisco Union Stockyards, Tariff 8 ..... 12, 13, 15
Springfield Stock Yards Co., Springfield, Ill., Tariff 2 15
St. Joseph Stock Yards Co., Tariff 20 ..... 11, 15
St. Louis National Stockyards Co., Tariff 9 15
St. Paul Union Stockyards Co., Tariff 26 ..... 11, 14, 15
Stockton Union Stockyards, Stockton, California, Tariff 6 ..... 10, 11, 12, 13, 15
Texarkana Stockyards, Inc., Texarkana, Texas, Tariff 3 15
The Belt Rail Road and Stock Yards Co., Indianapolis, Indiana, Tariff 8 ..... 12, 13
The Buffalo Stock Yards, Tariff 11 ..... 11, 12, 13, 14
The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2 ..... 12, 13, 14
The Cincinnati Union Stock Yard Co., Tariff 12 ..... 13, 14

Miscellaneous—Continued Page
Regulations Issued by Stockyard Owners—Continued
The Cleveland Union Stock Yards Co., Tariff 8.. 12, 13, 14
The Denver Union Stock Yard Co., Tariff 14. 11, 14, 15
The Detroit Stock Yards, Tariff 12..... 12, 13, 14
The Evansville Union Stock Yards Co., Tariff 10. 12, 13, 14
The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2..... 11, 12, 13, 14
The Jersey City Stock Yards, Inc., Tariff 2..... 14
The Joplin Stockyards, Inc., Joplin, Missouri, Tariff 3..... 12, 13, 14
The Ogden Union Stockyards Co., Tariff 12. 10, 12, 15
The Peoria Union Stockyards Co. Inc., Tariff 11.. 12, 13, 15
The Sioux City Stock Yards Co., Tariff 15... 11, 13, 15
The Union Stock Yard and Transit Co. of Chicago, Tariff 17..... 14
The Union Stock Yards Co., Dayton, Ohio, Tariff 6..... 12, 13, 14
The Union Stock Yards Co., Springfield, Missouri, Tariff 3..... 12, 13, 15
The Wichita Union Stock Yards Co., Tariff 13.. 11, 13, 14, 15
Tulsa Stockyards, Inc., Tariff 4..... 12, 13, 15
Union Stock Yard & Market Co., New York, New York, Tariff 7..... 15
Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11..... 10, 11, 13, 14
Union Stock Yard Co. of Lancaster, Tariff 10.... 14
Union Stockyards Co. of Fargo, West Fargo, N. D., Tariff 7..... 12, 13, 14
Union Stock Yards Co. of Montgomery, Tariff 11. 10, 12, 13, 15
Union Stock Yards Company of Omaha, Tariff 17. 11, 15
Union Stock Yards, San Antonio, Texas, Tariff 13. 10, 11, 13, 15
Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2..... 12, 14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, the Secretary of Agriculture of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on February 15, 1957, in the above-entitled cause.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is printed in Appendix A to this petition, *infra*, pp. 25–33, and is reported in 241 F. 2d 192.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra, pp. 34–35) was entered on February 15, 1957. The jurisdiction of this Court is invoked under 5 U. S. C. 1952 ed. § 1040 and 28 U. S. C. 1952 ed. § 1254 (1). It is provided, *inter alia*, in 5 U. S. C.

1952 ed. § 1040 that "[e]ither the United States or the agency or an aggrieved party may file such petition for a writ of certiorari."

QUESTIONS PRESENTED

A stockyard owner and market agency are obligated—under the Packers and Stockyards Act—"upon reasonable request" to furnish "reasonable stockyard services" at a stockyard which is regulated under the Packers and Stockyards Act, and a stockyard owner and market agency are also required by the Act to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of "reasonable stockyard services." The regulations issued by the stockyard owner were challenged, in the administrative proceeding, by a market agency, but no evidence was adduced as to whether the regulations are unreasonable. The questions presented are:

(1) Whether the regulations are, as a matter of law, illegal on their face because in a certain hypothetical situation, referred to by the Court of Appeals, the regulations would seem to be unreasonable.

(2) Whether the regulations are, as a matter of law, illegal in their entirety because, as held by the Court of Appeals, in a certain hypothetical situation a significant part of the regulations would be unreasonable.

(3) Whether, in the total absence of any evidence to show that the regulations are unreasonable, the regulations are, as a matter of law, unreasonable and the administrative agency is required, as a matter of law,

to issue a cease and desist order with respect to the regulations.

THE STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS

The petition for judicial review of the administrative decision, holding that the regulations are not, on their face, illegal as a matter of law, is based on the Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*), and the administrative decision thus subjected to judicial review is based on the Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*).

The Packers and Stockyards Act regulates, *inter alia,* the marketing of livestock at those stockyards which are "posted" by the Secretary of Agriculture, i. e., determined by the Secretary to be within the statutory definition of a "stockyard" in 7 U. S. C. 1952 ed. § 202 (a). The Act prohibits a market agency or dealer from engaging in business at a posted stockyard unless the market agency or dealer is registered with the Secretary. 7 U. S. C. 1952 ed. § 203. A "market agency" is defined in the Act as "any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." 7 U. S. C. 1952 ed. § 201 (c). The statutory term "stockyard services" is defined as "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b). The term

"dealer" is defined in the Act as "any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser." 7 U. S. C. 1952 ed. § 201 (d). The term "stockyard owner," as defined in the Act, means "any person engaged in the business of conducting or operating a stockyard." 7 U. S. C. 1952 ed. § 201 (a).

It is "the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *." 7 U. S. C. 1952 ed. § 205. It is also "the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. 1952 ed. § 208.

Whenever after a "full hearing upon a complaint * * * the Secretary is of the opinion that any * * * regulation * * * of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary may "determine and prescribe * * * what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed" and may by order require the stockyard owner or market agency to "conform to and observe the regulation or practice so prescribed." 7 U. S. C. 1952 ed. § 211.

The Secretary is authorized to issue "such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter * * *." 7 U. S. C. 1952 ed. § 228. The regulations issued by the Secretary relate, *inter alia,* to the posting of stockyards, the registration of market agencies and dealers, and the facilities and services at posted stockyards. 9 CFR Cum. Supp. § 201.1 *et seq.* The rules of practice issued by the Secretary relate, *inter alia,* to disciplinary and other adjudicatory proceedings. 9 CFR § 202.5 *et seq.*

It is provided in the rules of practice that informal complaints may be filed by an interested person, and "if the Administrator should so determine, a proceeding filed pursuant to section 304 of the Act [i. e., 7 U. S. C. 1952 ed. § 205] or a proceeding involving the application of a regulation established or filed pursuant to section 307 of the Act [i. e., 7 U. S. C. 1952 ed. § 208], may be instituted upon the moving paper filed by the person who filed the informal complaint." 9 CFR § 202.6 (b).

STATEMENT

The genesis of the case is the complaint filed with the Secretary of Agriculture by the Producers Livestock Marketing Association, a market agency at the Denver Union Stock Yard. It is alleged in the complaint that certain regulations issued by the Denver Union Stock Yard Company are invalid under the Packers and Stockyards Act (R. 40–44).[1] The con-

[1] The references herein to the record are to the Transcript of Record filed in this Court by the Denver Union Stock Yard Company in connection with its petition for certiorari—to re-

tested regulations, issued by the stockyard owner, provide that "[n]o market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property * * * [s]olicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere" or divert livestock from this market which would otherwise normally come to this market or interfere with the normal flow of livestock to this market (R. 40–44). The "normal marketing area" is defined in the regulations as being the State of Colorado with certain counties or areas therein excepted (R. 41). It is averred in the complaint that the regulations are invalid and the prayer, in the complaint, is that the regulations be set aside and annulled (R. 40–44).

It was administratively determined, under the procedural regulations (9 CFR § 202.6 (b)), that the "complaint should be entertained as the moving paper initiating a proceeding [by the Producers Livestock Marketing Association, as the complainant, against the Denver Union Stock Yard Company, as the respondent in the administrative proceeding] under the rules applicable to disciplinary proceedings * * *" (R. 63).

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view the judgment of the Court of Appeals as to which we are also filing this petition for certiorari—in *Denver Union Stock Yard Company* v. *Producers Livestock Marketing Association*, October Term, 1956, No. 917.

An answer was filed, in the administrative proceeding, by the Denver Union Stock Yard Company admitting that it issued the regulations and alleging, *inter alia*, that the regulations are necessary to enable the stockyard owner "to furnish, upon reasonable request, without discrimination, reasonable stockyard services * * * and to enable the patrons of the Denver Union Stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services * * *" (R. 47). It is also alleged in the answer that the practices of the Producers Livestock Marketing Association and some others are contrary to the duties and responsibilities of such registrants at this market and that the regulations are necessary in order to effectuate just, reasonable, and non-discriminatory practices at the Denver market (R. 47–48). The prayer in the answer is that the Stock Yard Company "be granted an oral hearing * * * and that the complaint be dismissed" (R. 49).

The Denver Union Stock Yard Company, as the respondent in the administrative proceeding, filed a motion—in preparation for the administrative hearing—to require the Producers Livestock Marketing Association to produce, for examination and copying, certain books and records identified in the motion and alleged to be relevant and necessary in order to show that the contested regulations are reasonable and relate only to the performance of reasonable stockyard services (R. 50–55).

In opposing the motion by the Stock Yard Company for the production of certain books and records

of the marketing association, the Producers Livestock Marketing Association filed an election "to stand upon the illegality of said regulation, as a matter of law," and contended that the regulation "is illegal and invalid upon its face" (R. 73). It was stated by the Producers Livestock Marketing Association, in its "Election to Rest," that "it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law," and it was stated that the Association "hereby rests and submits its case for final decision by the Secretary of Agriculture" (R. 73).

The Hearing Examiner was of the opinion that the proceeding, in these circumstances, should be "certified to the Judicial Officer for decision, with a recommendation that it be dismissed" (R. 74). The basic issue, viz, whether the regulations are as a matter of law illegal on their face, was resolved by the Judicial Officer.[2] The Judicial Officer concluded that, upon the limited record before him, he could not find that the contested regulations of the Denver Union Stock Yard Company, the respondent in the administrative proceeding, are invalid upon their face and, accordingly, he dismissed the complaint (R. 32–33). It was made plain in the decision by the Judicial Officer that the issue for decision is not the broad question as to whether the regulations are, under the relevant facts and circumstances, valid or invalid but only the nar-

[2] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to the Judicial Officer. 10 F. R. 13769; 11 F. R. 177A–233; 18 F. R. 3219, 3648; 19 F. R. 74.

row question as to whether the regulations are, as a matter of law, invalid on their face (R. 16).

The Producers Livestock Marketing Association filed a petition in the Court of Appeals to review the decision of the Judicial Officer. The United States and the Secretary of Agriculture were designated as the respondents in the Court of Appeals (R. 1), and the Denver Union Stock Yard Company intervened as a respondent in the Court of Appeals (R. 33–34).

The Court of Appeals concluded that the regulations are violative of the statutory requirement that a stockyard owner or market agency shall, upon reasonable request, furnish reasonable stockyard services at a posted stockyard. "The compulsion of the regulation," said the Court of Appeals (*infra*, Appendix A, pp. 30–31), "is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act] which contemplates and imposes a duty upon marketing agencies to render reasonable services to its [sic] customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a market agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another." Accordingly, the Court of Appeals was of the opinion that the regulations are an unlawful restriction upon "the statutory rights and duties of petitioners and all market agencies" and bear "no reasonable relationship to the duties required of the stockyard company under the provisions of the Packers and

Stockyards Act," and are invalid (*infra,* Appendix A, pp. 32–33). The Court of Appeals remanded the proceeding to the Secretary of Agriculture with directions to issue a cease and desist order against the issuance or enforcement of the regulations by the stockyard owner (*infra,* Appendix, B, pp. 34–35).

REASONS FOR GRANTING THE WRIT

1. The furnishing of "reasonable stockyard services," by stockyard owners and market agencies, is a basic requirement of the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 205), applicable at more than 450 stockyards throughout the Nation. Although the term "stockyard services" is defined in the Act (7 U. S. C. 1952 ed. § 201 (b)), there is, however, no statutory definement of the word "reasonable" as used in the term "reasonable stockyard services." The stockyard owners and market agencies are required by the Act to issue, observe, and enforce regulations to effectuate the furnishing of "reasonable stockyard services." 7 U. S. C. 1952 ed. § 208. These provisions, in the statutory plan, are of pivotal importance in the administration of the Act.

Various terminal stockyards have regulations which are similar to the contested rules of the Denver Union Stock Yard Company.[3] Many terminal stockyards

[3] See, Kansas City Stock Yards Co., Tariff 12, Rules 9 and 10; Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Supplement 13, Rule 14; Los Angeles Union Stockyards Co., Tariff 16, Item 10 (c); Union Stock Yards, San Antonio, Texas, Tariff 13, Item 10 (c); The Ogden Union Stockyards Co., Tariff 12, Rule 11; Union Stock Yards Co. of Montgomery, Tariff 11, Rule 9; Jonesboro Stockyards, Inc., Jonesboro, Arkansas, Tariff 2, Supplement 7, Rule 9; Stock-

have regulations in effect to prohibit market agencies and dealers from engaging in various business activities in certain areas of the stockyards or in certain areas adjacent to the stockyards.[4] It is provided in

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ton Union Stockyards, Stockton, California, Tariff 6, Rules 1 (A), 1 (C) (3), 1 (C) (6), 1 (C) (7); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, Rules 13 and 14. These regulations are on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture. An adjudicatory proceeding is pending in the Department with respect to the validity of the regulations in the Los Angeles market. *Producers Livestock Marketing Association* v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188. It is provided in the regulations applicable to market agencies and dealers at the Los Angeles market, *inter alia*, as follows: "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." Los Angeles Union Stockyards Co., Tariff 16, Item 10 (c).

[4] See, Union Stock Yards, San Antonio, Texas, Tariff 13, Item 10 (a) and (b); St. Paul Union Stockyards Co., Tariff 26, Rule 8; Union Stock Yards Co. of Omaha, Tariff 17, Rule 4; Kansas City Stock Yards Co., Tariff 12, Rule 14; The Denver Union Stock Yard Co., Tariff 14, Item 10 (a); Ft. Worth Stockyards, Tariff 7, Rule 9; Los Angeles Union Stockyards Co., Tariff 16, Item 10 (a) and (b); The Sioux City Stock Yards Co., Tariff 15, Rule 8; The Wichita Union Stock Yards Co., Tariff 13, § VI (C); St. Joseph Stock Yards Co., Tariff 20, Item 11 (l); Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Rule 6; Billings Public Stockyards, Billings, Montana, Tariff 5, Rule 8; Brighton Stock Yards Co., Brighton, Mass., Tariff 2, Rule 4; The Buffalo Stock Yards,

the regulations in effect in 42 terminal stockyards that "stockyard services" will be furnished only to a "reasonable number" of market agencies and dealers, and the stockyard companies reserve the right to refuse to furnish any services to market agencies and dealers in excess of the number considered by the

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Tariff 11, Rule 4; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, Rule 9; The Cleveland Union Stock Yards Co., Tariff 8, Rule 9; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, Rule 6; The Detroit Stock Yards, Tariff 12, Rule 4; The Evansville Union Stock Yards Co., Tariff 10, Rule 12; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, Rule 9; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, Rule 8; Port City Stockyards Co., Houston, Texas, Tariff 4, Rule 7; The Belt Rail Road and Stock Yards Co., Indianapolis, Indiana, Tariff 8, Rule 10; The Joplin Stockyards, Inc., Joplin, Missouri, Tariff 3, § 9 (C) and (J); Greater Little Rock Stockyards, Tariff 1, Item 7; South Memphis Stock Yards Co., Tariff 11, § 13 (7); Milwaukee Stockyards, Tariff 3, Rule 8; Union Stock Yards Co. of Montgomery, Tariff 11, Rule 3 (c); The Ogden Union Stockyards Co., Tariff 12, Rule 10; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, Rule 4; The Peoria Union Stock Yards Co., Tariff 11, Item 3; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (4); Portland Union Stock Yards Co., Tariff 19, Rule 9; Richmond Union Stock Yards Co., Tariff 9, Rule 9; Missi. ippi Valley Stockyards, St. Louis, Missouri, Tariff 8, Rule 4; Salt Lake Union Stock Yards, Tariff 8, Rule 8; South San Francisco Union Stockyards, Tariff 8, Rule 9; Sioux Falls Stock Yards Co., Tariff 11, Rule 8; Old Union Stockyards Co., Spokane, Washington, Tariff 9, Rule 11; The Union Stock Yards Co., Springfield, Missouri, Tariff 3, Item 13; Stockton Union Stockyards, Stockton, California, Tariff 6, Rule 8; Tulsa Stockyards, Inc., Tariff 4, Item 6 (4); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, Rule 4. These regulations are on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture.

stockyard companies to be reasonable.[5] It is the general practice of the stockyard companies to promulgate rules whereby stockyard services are denied to any market agency or dealer who engages in unfair,

[5] See, Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Rule 2; Billings Public Stockyards, Billings, Montana, Tariff 5, Rule 15 (B); The Buffalo Stock Yards, Tariff 11, Rule 3; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, Rule 13; The Cincinnati Union Stock Yard Co., Tariff 12, Rule 9; The Cleveland Union Stock Yards Co., Tariff 8, Rule 2 (b); The Union Stock Yards Co., Dayton, Ohio, Tariff 6, Rule 9; The Detroit Stock Yards, Tariff 12, Rule 3; The Evansville Union Stock Yards Co., Tariff 10, Rule 2; Union Stockyards Co. of Fargo, West Fargo, N. D., Tariff 7, Rule 1 (B); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, Rule 10; Fort Worth Stockyards, Tariff 7, Rule 2; Port City Stock Yards Co., Inc., Houston, Texas, Tariff 4, Rule 4; The Belt Rail Road and Stock Yards Co., Indianapolis, Ind., Tariff 8, Rule 2; Jonesboro Stockyards, Inc., Jonesboro, Ark., Tariff 2, Rule 4; The Joplin Stockyards, Inc., Joplin, Mo., Tariff 3, § 9 (G); Greater Little Rock Stockyards, Tariff 1, Item 11; Los Angeles Union Stockyards Co., Tariff 16, Item 4; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, Rule 2; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7, § 6; South Memphis Stock Yards Co., Tariff 11, § 6; Milwaukee Stockyards, Tariff 3, Rule 10; Union Stock Yards Co. of Montgomery, Tariff 11, Rule 2; Oklahoma National Stock Yards Co., Tariff 12, Rule 9; Parsons Stockyards Operating Co., Parsons, Kan., Tariff 2, Rule 6; The Peoria Union Stockyards Co. Inc., Tariff 11, Item 13; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (2); Portland Union Stock Yards Co., Tariff 19, Rule 15; Richmond Union Stock Yards Co., Tariff 9, Rule 2; Union Stock Yards, San Antonio, Tariff 13, Item 4; South San Francisco Union Stockyards, Tariff 8, Rule 14; The Sioux City Stockyards Co., Tariff 15, Rule 13; Sioux Falls Stock Yards Co., Tariff 11, Rule 13; Old Union Stockyards Co., Spokane, Wash., Tariff 9, Rule 2; The Union Stock Yards Co., Springfield, Mo., Tariff 3, Item 10; Stockton Union Stockyards, Stockton, California, Tariff 6, Rule 1 (B); Tulsa Stockyards, Inc., Tariff 4, Item 6 (8); The

dishonest, or fraudulent practices, or who destroys stockyard property, or who engages in other proscribed activities.[6] It cannot be gainsaid that the authority of the stockyard owners to issue rules and regulations with respect to the furnishing of reasonable stockyard services, upon reasonable request, is of vital importance in this great industry.

Wichita Union Stock Yards Co., Tariff 13, § VI (G); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, Rule 9; St. Paul Union Stockyards Co., Tariff 26, Rule 15; Kansas City Stock Yards Co., Tariff 12, Rule 6; The Denver Union Stock Yard Co., Tariff 14, Item 4. These regulations are on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture.

[6] See, Union Stock Yard Co. of Baltimore County, Tariff 11, Rules 11 and 12; Billings Public Stockyards, Billings, Montana, Tariff 5, Rules 9 and 15 (F); Brighton Stock Yards Co., Brighton, Mass., Tariff 2, Rule 3; The Buffalo Stock Yards, Tariff 11, Rule 13; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, Rules 10 and 11; The Union Stock Yard and Transit Co. of Chicago, Tariff 17, § 11; The Cincinnati Union Stock Yard Co., Tariff 12, Rule 13; The Cleveland Union Stock Yards Co., Tariff 8, Rule 14; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, Rule 11; The Detroit Stock Yards, Tariff 12, Rule 12; The Evansville Union Stock Yards Co., Tariff 10, Rule 8; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, Rule 10; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, Rules 1, 2, and 21; Fort Wayne Union Stock Yards Co., Tariff 6, Rule 4; Fort Worth Stockyards, Tariff 7, Rules 6, 8, and 13; Port City Stock Yards Co., Houston, Texas, Tariff 4, Rules 10 and 12; The Jersey City Stock Yards, Inc., Tariff 2, § IX; Jonesboro Stockyards, Inc.; Jonesboro, Ark., Tariff 2, Rules 1 and 6; The Joplin Stockyards Inc., Joplin, Mo., Tariff 3, §§ 9 (D), 9 (E), and 9 (I); Union Stock Yard Co. of Lancaster, Tariff 10, p. 3; Greater Little Rock Stockyards, Tariff 1, Items 8 and 9; Los Angeles Union Stockyards Co., Tariff 16, Item 1; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, Rule 9; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7,

The regulations in the case at bar were issued by the stockyard owner at the Denver market, and the regulations were nullified by the Court of Appeals on a record that (1) is void of an administrative find-

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§ 12 (3); South Memphis Stock Yards Co., Tariff 11, § 13 (4); Milwaukee Stockyards, Tariff 3, Rule 9; Union Stock Yards Co. of Montgomery, Tariff 11, Rule 14; Farmers National Stock Yard Co., Muncie, Ind., Tariff 2, Rule 7; Nashville Union Stock Yards, Inc., Tariff 9, Rules 5 and 6; St. Louis National Stockyards Co., Tariff 9, § XV; Union Stock Yard & Market Co., New York, New York, Tariff 7, Item 7 (1); The Ogden Union Stockyards Co., Tariff 12, Rule 17; Oklahoma National Stock Yards Co., Tariff 12, Rule 11; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, Rules 9, 10, and 11; The Peoria Union Stock Yards Co., Tariff 11, Item 1; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (8) and (9); Portland Union Stock Yards Co., Tariff 19, Rules 10 and 14; Richmond Union Stock Yards Co., Tariff 9, Rule 13; St. Joseph Stock Yards Co., Tariff 20, Item 11 (3) and (4); Mississippi Valley Stockyards, St. Louis, Mo., Tariff 8, Rule 1; Salt Lake Union Stock Yards, Tariff 8, Rule 5; Union Stock Yards, San Antonio, Tariff 13, Item 2; South San Francisco Union Stockyards, Tariff 8, Rule 10; Seattle Union Stockyards Co., Tariff 1, Item 11; The Sioux City Stock Yards Co., Tariff 15, Rule 9; Sioux Falls Stockyards Co., Tariff 11, Rule 9; Old Union Stockyards Co., Spokane, Washington, Tariff 9, Rule 10; Springfield Stock Yards Co., Springfield, Ill., Tariff 2, Rules 4 and 7; The Union Stock Yards Co., Springfield, Mo., Tariff 3, Item 12; Stockton Union Stockyards, Stockton, California, Tariff 6, Rule 9; Texarkana Stockyards, Inc., Texarkana, Texas, Tariff 3, Item 7 (1), (2), and (8); Tulsa Stockyards, Inc., Tariff 4, Item 6 (2) and (5); The Wichita Union Stock Yards Co., Tariff 13, § VI (D) and (E); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, Rule 11; St. Paul Union Stockyards Co., Tariff 26, Rule 9; Union Stock Yards Company of Omaha, Tariff 17, Rule 3; Kansas City Stock Yards Co., Tariff 12, Rules 1 and 2; The Denver Union Stock Yard Co., Tariff 14, Item 1. These regulations are on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture.

ing that the regulations are unreasonable and (2) is barren of evidence to show that the regulations are unreasonable. The complainant—market agency—in the administrative proceeding against the Denver Union Stock Yard Company filed an "Election to Rest," stating that the complainant "will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law" (R. 73). The complainant elected to stake its case on the proposition that the regulations are invalid on their face as a matter of law and that all evidence is, therefore, immaterial in this proceeding (R. 73). The only question, therefore, before the Judicial Officer in the Department of Agriculture was whether the regulations were on their face illegal as a matter of law, and being unable to conclude that the regulations, considered *in vacuo*, are as a matter of law illegal, the Judicial Officer dismissed the complaint (R. 6–33). Specifically, the Judicial Officer did not decide the question which could have been presented during the administrative hearing—but which was not presented—by the complainant as to whether the regulations are, in view of the facts, unreasonable and, therefore, invalid.[7] The Court of Appeals—although recognizing that the only question is whether the regulations are as a matter of law illegal on their face—resolved the basic

[7] The Judicial Officer has no statutory authority, in this adjudicatory proceeding, to compel the complainant to rely on an additional issue—an issue which is antithetical to the complainant's position that its books and records should not be made available to the Stock Yard Company.

issue of law by assuming a factual situation which is not in the case. The Court of Appeals held:

> The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [sic] customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another (*infra,* Appendix A, pp. 30–31).

The decisiveness of that holding by the Court of Appeals is revealed by its explanation that "[a]lthough it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [i. e., the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [i. e., reasonable stockyard services], still such argument, even if proved to be soundly based in fact, has no legal significance" (*infra,* Appendix A, p. 31).

There is nothing in the record to support the hypothesis or *suppositum* by the Court, and the Court's opinion is based only on the supposal set forth in its opinion. The holding by the Court is squarely in conflict with *Associated Press* v. *Labor Board,* 301

U. S. 103, 132, in which it was held that courts, in passing on the validity of regulation under an Act of Congress, are to dispose of a case "upon the basis of the facts disclosed," never on the basis of "nonexistent and assumed circumstances." It was argued in *Associated Press* v. *Labor Board, supra,* that the regulation would be illegal in a certain hypothetical situation, but that was disposed of by the Court's statement that "[n]o such question is here for decision. * * * [The appellant] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."

The principle which was applied in *Associated Press* v. *Labor Board, supra,* 301 U. S. at 132, is particularly forceful with respect to a statutory standard of generality and adaptability such as the term "reasonable." "Questions of reasonableness are necessarily questions of relation or degree," and each case "demands a close scrutiny of its own facts." *Sugar Institute* v. *United States,* 297 U. S. 553, 600. The statutory terms—the requirements for the furnishing of "reasonable stockyard services" upon "reasonable request" and the issuance of reasonable regulations to effectuate the legislative goal—do not lend themselves to application with exactitude as a matter of law but constitute a policy to be followed in view of the mutable and variant factual situations in the various stockyards throughout the country. The application of the statutory rule of reasonableness mani-

festly turns on the exigencies of a particular situation.[8]

The stockyard owner, in its answer in the administrative proceeding in the case at bar, denied that the regulations are discriminatory or unreasonable and averred that the regulations are necessary to enable the stockyard owner "to furnish, upon reasonable request, without discrimination, reasonable stockyard services * * * and to enable the patrons of the Denver Union Stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services * * *" (R. 47). To be sure, the complaint filed in the administrative proceeding alleged the invalidity of the regulations (R. 40–44) but "[u]nreasonableness is not made out by mere assertion." *Swift & Co.* v. *United States*, 343 U. S. 373, 388. *A fortiori* unreasonableness is not made out by mere speculation or surmise. The statute here, as in *United States* v. *Trucking Co.*, 310 U. S. 344, 352–353, "does not attempt to define an unlawful discrimination with mathematical precision" and whether a particular practice is "unreasonable" or "unjust" and therefore unlawful is for determination by the administrative agency in the "application of an informed judgment to existing facts."

[8] It has been said that "[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint" (*Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246, 251), and a stockyard owner or market agency is not required, under the Packers and Stockyards Act, to furnish stockyard services "under any and all circumstances to all comers" (*DeVries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C. A. 8), certiorari denied, 344 U. S. 934).

If regulations are invalid whenever it can be surmised or conjectured that in a particular situation the regulations would be discriminatory or unreasonable, the congressional purpose for the issuance and enforcement of the regulations will be seriously impaired. The furnishing of reasonable stockyard services, as required by the Act, is facilitated in many markets throughout the Nation by the issuance and enforcement of regulations, *supra*, pp. 10–15, and the reasonableness of the regulations plainly depends upon the facts in each case.[9] The basis for the holding of the Court of Appeals will make the administration of the Packers and Stockyards Act subject to manifest uncertainties and inequities. The disruptive effect of the holding by the Court of Appeals is of wide concern to the many stockyard owners who "[s]ince 1947 * * * have spent millions of dollars in modernizing and improving their facilities so as to give better service to patrons" (*Marketing*, Yearbook of Agriculture, 1954, p. 283). The decision by the Court of Appeals is also a matter of important concern to the Secretary of Agriculture in the adminis-

[9] See, e. g., *Fort Worth Stockyards Co.* v. *Brown* (Tex. C. C. A.), 161 S. W. 2d 549, 551–555; *Farmers Union Livestock Ass'n* v. *St. Paul Union S. Co.*, 97 F. Supp. 539–540 (D. Mont.); *De Vries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C. A. 8), certiorari denied, 344 U. S. 934; *Kelly* v. *Union Stockyard & Transit Co. of Chicago*, 190 F. 2d 860, 864 (C. A. 7); *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 23–27; *Farmers Union Livestock Ass'n* v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026, 1032–1033; *Dougherty* v. *Union Stock Yard & Transit Co.*, 13 Agr. Dec. 239, 242–245.

tration of this legislation which is applicable to one of the major branches of our agricultural economy.[10] The issue decided by the Court of Appeals is of wide public importance, and should be passed upon by this Court.

2. The statutory provision relied on by the Court of Appeals is applicable only to a part of the regulations. The Court of Appeals said that the "compulsion" of the regulations "is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act] which contemplates and imposes a duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business" (*infra,* Appendix A, pp. 30–31). There is, however, no statutory duty in this respect as to dealers (7 U. S. C. 1952 ed. § 205), and the contested regulations are applicable to dealers as well as to market agencies. The assumed case on which the Court of Appeals disposed of the case does not relate to a dealer,[11] and if it did involve a dealer

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[10] The Secretary's regulations—applicable in all stockyards under the Act—provide that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area." 9 CFR Cum. Supp. § 201.63. This regulation is similar to a significant part of the regulations, in the case at bar, invalidated by the Court of Appeals.

[11] This proceeding to have the regulations declared invalid was instituted by a market agency. No complaint has been made by a dealer, and no contention has been made by the market agency that it is prejudiced by the regulative provisions as to dealers. Hence, a question with respect to the regulations

there would be no impingement on the statutory provision referred to by the Court of Appeals.

There is manifestly no reason for nullifying the regulations with regard to dealers. Even if the regulations, in the hypothetical situation referred to by the Court of Appeals, are discriminatory or unreasonable as to market agencies, there is no ground for striking down the regulations with respect to dealers also. The Court of Appeals had jurisdiction to set aside or suspend, "in whole or in part, the order of the agency" (5 U. S. C. 1952 ed. § 1039 (a)), and it was clearly erroneous for the Court to nullify regulatory provisions which have not been challenged and which are clearly not invalid under the provision in the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 205) relied on by the Court.

3. The decision of the Court of Appeals—ordering the Judicial Officer to issue a cease and desist order against the enforcement of the regulations—is repugnant to the provision of the Packers and Stockyards Act that whenever after a "full hearing upon a complaint * * * the Secretary is of the opinion that any * * * regulation * * * of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary may determine and prescribe what regulation is or will be just, reasonable, and nondiscriminatory to be thereafter followed and the Secretary may by order re-

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as applied to dealers would be outside the scope of this litigation.

quire the stockyard owner or market agency to conform to and observe the regulation prescribed by the Secretary. 7 U. S. C. 1952 ed. § 211. It is beyond the jurisdiction of the Court of Appeals (5 U. S. C. 1952 ed. § 1039 (a)) to order the Secretary to issue a cease and desist order.

This Court has said that "the function of the reviewing court ends when an error of law is laid bare," and the proceeding should then be remanded to the administrative agency "for reconsideration." *Federal Power Com.* v. *Idaho Power Co.*, 344 U. S. 17, 20. See, also, *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 373–376; *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141–146. Here the regulations as to dealers are not subjected to attack in this litigation, and the Court of Appeals plainly erred in ordering the Secretary to issue a cease and desist order as to the regulations *in toto*.

The latitude which Congress vested in the Secretary has been destroyed by the decision of the Court of Appeals. The decision by the Court of Appeals should be reversed, and the Secretary of Agriculture will then be free to institute an investigation or proceeding, if such is deemed to be appropriate, with respect to whether the regulations at issue in this litigation are, in view of the facts, unreasonable. In this area of administration, where flexibility is necessary in view of the totality of the facts in each situation, the impairment of the basic statutory purpose is a matter of such important concern as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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MAY 1957.

APPENDIX A

Opinion of the Court Below

United States Court of Appeals, Tenth Circuit

No. 5459—January Term, 1957

Producers Livestock Marketing Association, a corporation of Salt Lake City, Utah, petitioner

v.

United States of America and Ezra Taft Benson, Secretary of Agriculture, respondents

Denver Union Stockyard Company, intervenor-respondent

On petition to review decision and order of the Secretary of Agriculture

(February 15, 1957)

Before Huxman, Pickett and Lewis, *Circuit Judges*

Lewis, *Circuit Judge.*

This is a proceeding brought by petitioner under the Hobbs Act [1] seeking review of an order of the Secretary of Agriculture made under the Packers and Stockyards Act of 1921 (42 Stat. 159 as amended, 7 U. S. C. 1952 Ed., sec. 181, et seq.).[2] Petitioner is a

[1] Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. A. 1031, et seq.

[2] All further references to congressional enactments are to the Packers and Stockyards Act of 1921, as amended, except as specifically noted.

"marketing agency" as defined by the Act and has its principal office at Salt Lake City.[3] The United States is named respondent pursuant to statute[4] and the Secretary of Agriculture by rule of this court.[5] The Denver Union Stockyard Company is a "stockyard owner" as defined by the Act and has intervened as a party in interest upon motion, and as a matter of right.[6]

Section 307 of the Act[7] provides:

> It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

Under the purported authority of this section the stockyard company did on May 11, 1955, issue the following Regulation 10 (c) contained in its "Tariff No. 14":

Item 10

INTERFERENCE WITH OPERATIONS

(a) * * *
(b) * * *
(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock

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[3] 5 U. S. C. 1033 provides: "The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any such parties has its principal office, or in the United States Court of Appeals for the District of Columbia."

[4] 5 U. S. C. A., 1034.

[5] Rule 34 (1) as revised.

[6] 5 U. S. C. A., 1038.

[7] 7 U. S. C. A., 208.

Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes.

On July 7, 1955, the petitioner herein challenged the validity of the regulation by filing a complaint [8] with

[8] The administrative proceeding instituted by the Petitioner was a disciplinary proceeding which the Secretary is authorized to conduct as a result of complaints made concerning regula-

the Secretary of Agriculture to which the stockyard company answered. The elaborations of complaint and answer need not be set forth for purposes of present inquiry except to state that the status of petitioner and intervenor are admitted together with the issuance of the regulation attacked. At the hearing set before the judicial officer of the Department of Agriculture petitioner elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law, illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon petitioner and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application; and dismissed petitioner's complaint. Aggrieved by the result and facing expulsion from the Denver yard upon violation of the regulation, petitioner seeks this review.

Being a public utility[9] the stockyard company has the inherent right to adopt regulations in regard to those phases of its business which are secondary to its major functions. Certain it is that the utility may prescribe rules for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory

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tions of stockyard owners (7 U. S. C. A. 211). The statute provides that "after full hearing upon a complaint" if the Secretary is of the opinion that the regulation is unjust, unreasonable, or discriminatory, he may order the stockyard owner to "cease and desist" from enforcing any such regulation (7 U. S. C. A. 211).

[9] *Stafford* v. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

regulations to that end.[10] Such right is not necessarily dependent upon statutory authority. But a regulation the effect of which is to govern not only the services rendered by the stockyard company but also services provided by a marketing agency and which, if disobeyed, will divorce the two, can be lawful only if issued in furtherance of the basic duty established by sec. 304 of the Act which provides:

> It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *

Our inquiry is thus limited to a determination of whether or not the proposed regulation has any possible lawful application to the statutory duties imposed upon the stockyard company and the marketing agency "to furnish reasonable stockyard services." Stated more specifically: Does a stockyard company, in order to furnish reasonable stockyard services, have a right to restrict, by regulation, the diversion of the normal flow of livestock to its yard occasioned by any act of a marketing agency done within the normal marketing area of the yard?

It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a "full hearing" with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C. F. R. 202.11 (a) and 9 C. F. R. 202.2 (g). At such a hearing, so says the stockyard company, it intended to and would show

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[10] *Steele* v. *Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613, 112 A. L. R. 232; *DePass* v. *Broad River Power Co.*, 173 S. C. 387, 176 S. E. 325, 95 A. L. R. 545; *Hugh H. Hawkins* v. *Vermont Hydro-electric Corp.*, 98 Vt. 176, 126 Atl. 517, 37 A. L. R. 1359.

that Regulation 10 (c) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.

Although 9 C. F. R. 202.2 (g) defines "hearing" to be "that part of the proceeding which involves the submission of evidence", it is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. *Akron, C. & Y. Ry. Co.* v. *United States,* 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence.

The most casual study of Regulation 10 (c) shows the intent and effect of the rule to be an attempt to safeguard what the stockyard considers its normal market. Marketing agencies are not prohibited from dealing elsewhere entirely but are denied the services of the Denver yard if they even "endeavor to secure customers (within the prohibited geographic area) to sell or purchase elsewhere" than the Denver yards. The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 which contemplates

and imposes the duty upon marketing agencies to render reasonable services to its customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another.

Although it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties and thereby lower the ability of both to render efficient service, still such argument, even if proved to be soundly based in fact, has no legal significance. The test of the validity of the regulation is not so dependent. Nor does the stockyard have the right to exclude from its yards those persons who lawfully trod upon its economic toes. The operation of a stockyard is affected with a public interest and devoted to a public use. Any properly exclusionary regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by consideration of the parties which might form a valid basis of private contract. *Carnes* v. *St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N. W. 630; *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S. W. 1015; *Farmers' Livestock Commission Co.* v. *U. S.* (D. C. E. D. Ill.) 54 F 2d 375.

Stockyard companies are not monopolies and are in fact in active competition one with the other. The rights and duties thus occasioned must be correlated with the rights and duties of other entities recognized under the Act and, both, finally, with the paramount public interest. An exclusionary regulation based

upon diversion of business, such as we here consider, unlawfully restricts petitioner as a marketing agency and wounds the public interest. The persuasive words of the Supreme Court of Tennessee, passing upon the legality of a comparable situation, are in accord.

> Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires * * * the defendants to do all their business with complainant * * * *Nashville Union Stockyards* v. *Grissim, supra.*

The judicial officer expressed some concern as to whether he could properly consider this case absent some showing that the business done by petitioner with the stockyards was interstate commerce. Since the regulation was designed to affect all of the agents or dealers within the area, the question of petitioner's business does not arise, for whatever amounts to a constant practice and threatens to obstruct or unduly burden interstate commerce is within the regulatory power of Congress under the commerce clause, even though in a particular instance it affects only intrastate commerce. Stafford v. Wallace, supra, Note 9. Other contentions presented by the proponents of the regulation have been considered by us and deemed to be without merit.

We conclude that Regulation 10 (c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision of the

Packers and Stockyards Act. The regulation is invalid upon its face and the cause is accordingly remanded with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10 (c).

APPENDIX B

JUDGMENT OF THE COURT BELOW

United States Court of Appeals, Tenth Circuit

NO. 5459—JANUARY TERM, 1957

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, A CORPORATION OF SALT LAKE CITY, UTAH, PETITIONER

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, RESPONDENTS

DENVER UNION STOCKYARD COMPANY, INTERVENOR-RESPONDENT

ON PETITION TO REVIEW DECISION AND ORDER OF THE SECRETARY OF AGRICULTURE

(February 15, 1957)

Judgment

Twenty-first Day, January Term, Friday, February 15th, 1957.

Before Honorable WALTER A. HUXMAN, Honorable JOHN C. PICKETT and Honorable DAVID T. LEWIS, *Circuit Judges*

This cause came on to be heard on the petition to review the decision and order of the Secretary of Agriculture, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the

Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10 (c). It is further ordered that Producers Livestock Marketing Association, a corporation of Salt Lake City, Utah, petitioner, have and recover of and from Denver Union Stockyard Company, respondent, its costs herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 981

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A reply, in a few paragraphs, is appropriate in order to focus the issues and to mark out some of the erroneous or irrelevant arguments in the respondent's brief in opposition to our petition for certiorari.

1. The respondent asserts in its brief, pp. 4, 5, 8, 11, and 13, opposing certiorari that the Secretary is only a "nominal" party and has no administrative responsibility with respect to the regulations issued by a stockyard owner. If that were true, we would not have burdened the Court with this petition for certiorari.

The administrative duties of the Secretary apply, specifically, with regard to regulations issued by the various stockyard owners relative to the furnishing of "reasonable stockyard services" under 7 U. S. C.

1952 ed. § 205—the section relied on by the Court of Appeals for invalidating the regulations in this case. 7 U. S. C. 1952 ed. §§ 210 (a) and (c), 211, 212, 213 (a) and (b), and 222. The Secretary "may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201–203 and 205–217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections." 7 U. S. C. 1952 ed. § 210 (c). The "Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition * * *." Investigatory subpoenas may be issued by the Secretary in his administration of the Act (7 U. S. C. 1952 ed. § 222, incorporating 15 U. S. C. 1952 ed. §§ 46 and 48–50), and an investigatory subpoena *duces tecum,* issued by the Secretary in an investigation on his own motion, is judicially enforceable under the Packers and Stockyards Act (*Woerth* v. *United States,* 231 F. 2d 822, 823–825 (C. A. 8)).

The Secretary's duties under the Act include the issuance of administrative regulations. 7 U. S. C. 1952 ed. § 228. The regulations issued by the Secretary—applicable at more than 450 stockyards—provide that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned

to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area." 9 CFR Cum. Supp. § 201.63. The regulations issued by the Secretary are similar to a significant part of the regulations issued by the Denver Union Stock Yard Company and invalidated *in toto* by the Court of Appeals.

There can be no doubt as to the broad administrative responsibilities of the Secretary with respect to regulations relative to the furnishing of reasonable stockyard services, and the administrative responsibilities are underscored by the congressional enactment whereby the Secretary is authorized to participate "as of right" and be independently "represented by counsel," as in this case, with respect to litigation under the Packers and Stockyards Act (5 U. S. C. 1952 ed. §§ 1032, 1038, and 1040).

2. The reasonableness of the regulations, as to the furnishing of "reasonable stockyard services," should be determined on the basis of all the relevant facts. The Court of Appeals, however, held that the regulations are invalid on their face as a matter of law because, said the Court, "[i]f by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another" (see, our petition, Appendix A, p. 31). That is the decisive ground for the holding of the Court of Appeals, and the Court emphasized that even if evidence showed that the contested regulations

are conducive to the furnishing of reasonable stockyard services nonetheless an argument in support of the regulations, "even if proved to be soundly based in fact, has no legal significance" (*ibid.*).

The imaginant method of disposing of the case by the Court of Appeals is contrary to the administrative practice over a long period of time and, also, is contrary to the basic principle reapplied recently in *Alleghany Corp.* v. *Breswick & Co.*, Nos. 36, 82, and 114, this Term, decided on April 22, 1957. The determination of "reasonableness" with respect to the furnishing of stockyard services, like the standard of "control" involved in the *Alleghany* case, *supra*, involves "an issue of fact to be determined by the special circumstances of each case." *Id.* at p. 11, fn. 7, of slip opinion.

CONCLUSION

This case is of fundamental and wide importance to the Secretary in the administration of pivotal provisions in the Packers and Stockyards Act, and the case is likewise of fundamental and wide importance to one of the great branches of our agricultural economy. The petition for a writ of certiorari should, we submit, be granted.

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PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

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INDEX

	Page
Prior Opinions	1
Jurisdiction	2
The Statutory Provisions and Administrative Regulations	2
A. The Packers and Stockyards Act	2
B. The Administrative Regulations Under the Packers and Stockyards Act	4
C. The Provisions in the Hobbs Act	5
Questions Presented	6
Statement	7
A. The Administrative Proceeding and Decision	7
B. The Proceeding and Decision ... the Court of Appeals	11
Summary of Argument	12
Argument	23
I. The Regulations Relate to the Furnishing of Stockyard Services and Are Not, as a Matter of Law, Unreasonable so as To Be Violative of the Statutory Requirement for the Furnishing of "Reasonable Stockyard Services"	23
A. A Stockyard Owner Is Required by the Packers and Stockyards Act To Issue, Observe, and Enforce Regulations With Regard to the Furnishing of "Reasonable Stockyard Services" Upon "Reasonable Request"	23
B. The Statutory Criteria Are Terms of General Import To Be Applied to Diversified Factual Situations	26
1. The business activities which are referred to in the term "stockyard services" are of such broad and variable character that the statutory term "reasonable stockyard services" is manifestly without rigid and fixed meaning as a matter of law	26

Argument—Continued
B. The Statutory Criteria Are Terms of General Import To Be Applied to Diversified Factual Situations—Continued Page
2. The structure and purpose of the Act show that the application of the term "reasonable stockyard services" is dependent on the relevant factual circumstances.. 34
3. The long established administrative practice under the Act supports the view that the relevant facts—in the business areas involved—must be considered and evaluated in order to determine whether the regulations in this case are "unreasonable" so as to be violative of the statutory provisions..... 38
C. The Court of Appeals Erred in Holding That the Regulations Are, on Their Face, Illegal as a Matter of Law Under the Packers and Stockyards Act..... 52
1. The regulations are not illegal as a matter of law merely because in a certain hypothetical situation, referred to by the Court of Appeals, the regulations would seem to be unreasonable..... 54
2. The regulations are not as a matter of law unreasonable in their entirety merely because—as held by the Court of Appeals—in a certain hypothetical situation a part of the regulations would be unreasonable..... 58
3. In the total absence of any evidence to show that the regulations are unreasonable, the Court of Appeals erred (a) in holding that the regulations are, as a matter of law, unreasonable, and (b) in requiring the administrative

Argument—Continued Page

C. The Court of Appeals Erred in Holding That the Regulations Are, on Their Face, Illegal as a Matter of Law Under the Packers and Stockyards Act—Continued.

agency to issue a cease and desist order with respect to the regulations. The decision of the Judicial Officer in the Department of Agriculture—that the regulations are not, on their face, illegal as a matter of law—was correct, and should have been affirmed by the Court of Appeals. 60

4. On the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, the administrative agency will be free to take whatever action is appropriate with respect to the contested regulations 73

II. The Basic Statutory Determinants With Respect to the Validity of the Regulations at Issue on this Appeal Are Set Forth in the Packers and Stockyards Act 74

Conclusion 85

Appendix (Statutory Provisions) 86

CITATIONS

Statutes:

Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 1952 ed. 516a *et seq* 1

Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*) 2

5 U. S. C. 1952 ed. § 1032 5, 6

5 U. S. C. 1952 ed. § 1036 6

5 U. S. C. 1952 ed. § 1038 2, 6

5 U. S. C. 1952 ed. § 1039 (a) 59

5 U. S. C. 1952 ed. § 1040 2, 6

§ 13, 64 Stat. 1132 6

Statutes—Continued

Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*): Page
7 U. S. C. 1952 ed. § 182 (4) 15, 28
7 U. S. C. 1952 ed. § 201 *et seq.* 76
7 U. S. C. 1952 ed. § 201 (a) 3, 31
7 U. S. C. 1952 ed. § 201 (b) ... 3, 14, 24, 26, 27, 31, 32
7 U. S. C. 1952 ed. § 201 (c) 3
7 U. S. C. 1952 ed. § 201 (c) (1) 83
7 U. S. C. 1952 ed. § 201 (d) 3
7 U. S. C. 1952 ed. § 202 (a) 3
7 U. S. C. 1952 ed. § 203 3
7 U. S. C. 1952 ed. § 205 3,
5, 14, 18, 24, 25, 35, 53, 58, 59
7 U. S. C. 1952 ed. § 206 ..... 22, 81
7 U. S. C. 1952 ed. § 207 ..... 22, 81
7 U. S. C. 1952 ed. § 208 ..... 4, 5, 14, 24, 25, 35
7 U. S. C. 1952 ed. § 209 ..... 22, 81
7 U. S. C. 1952 ed. § 210 ..... 22, 81
7 U. S. C. 1952 ed. § 210 (c) 21, 73
7 U. S. C. 1952 ed. § 210 (e) 5
7 U. S. C. 1952 ed. § 211 4,
16, 17, 21, 22, 36, 37, 59, 60, 63, 73, 81
7 U. S. C. 1952 ed. § 212 ..... 22, 81
7 U. S. C. 1952 ed. § 217 ..... 5, 6
7 U. S. C. 1952 ed. § 217a 5
7 U. S. C. 1952 ed. § 222 ..... 21, 73
7 U. S. C. 1952 ed. § 228 ..... 4, 48
5 U. S. C. 1952 ed. § 1006 53
15 U. S. C. 1952 ed. §§ 46 and 48–50 73
28 U. S. C. 1952 ed. § 1254 (1) 2
Urgent Deficiencies Act of 1913, as amended (Act of October 22, 1913, 38 Stat. 220; 28 U. S. C. 1952 ed. §§ 2321–2325) 5

Cases:

Acker v. *United States*, 298 U. S. 426 ..... 37, 40, 63
Adams v. *Mills*, 286 U. S. 397 72
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227 ..... 55, 56
American Express Co. v. *United States*, 212 U. S. 522 25
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 ..... 23, 85
Armour & Co. v. *United States*, 312 U. S. 195 ..... 38, 72
Armour & Co. v. *Wantock*, 323 U. S. 126 57
Associated Press v. *Labor Board*, 301 U. S. 103 ..... 19, 20, 55, 56
Baltimore & O. R. v. *United States*, 277 U. S. 291 65

Cases—Continued

	Page
Barringer & Co. v. United States, 319 U. S. 1	64
Birmingham v. Rice Bros., 238 Iowa 410, 26 N. W. 2d 39	51
Bissell v. Spring Valley Township, 124 U. S. 225	72
Boutell v. Walling, 327 U. S. 463	51
Boyce Motor Lines v. United States, 342 U. S. 337	62
Carnes v. St. Paul Union Stockyards Co., 175 Minn. 294, 221 N. W. 20	51
Cella v. United States, 208 F. 2d 783 (C. A. 7)	50, 66
Chicago Board of Trade v. United States, 246 U. S. 231	22, 83
Cohens v. Virginia, 6 Wheat. 264	57
Commissioner v. Sternberger's Estate, 348 U. S. 187	51
Denver Stock Yard Co. v. United States, 304 U. S. 470	37, 40, 63
DeVries v. Sig Ellingson & Co., 100 F. Supp. 781 (D. Minn.)	51
Edward Hines Trustees v. United States, 263 U. S. 143	55
Edwards v. Darby, 12 Wheat. 206	51
Far East Conf. v. United States, 342 U. S. 570	57
Farmers Union Livestock Ass'n v. St. Paul Union S. Co., 97 F. Supp. 539 (D. Mont.)	50
Federal Comm'n v. Broadcasting Co., 309 U. S. 134	20, 59
Federal Communications Commission v. RCA Communications, Inc., 346 U. S. 86	22, 77, 79
Federal Power Com. v. Idaho Power Co., 344 U. S. 17	20, 59
Federal Trade Comm. v. Curtis Co., 260 U. S. 568	83
Federal Trade Commission v. National Lead Co., 352 U. S. 419	56
First National Bank v. Beach, 301 U. S. 435	62, 63
Fleming v. Mohawk, 331 U. S. 111	51
Ford Motor Co. v. Labor Board, 305 U. S. 364	59
Fort Worth Stockyards Co. v. Brown (Tex. C. C. A.), 161 S. W. 2d 549	51
Hartford Electric Light Co. v. Federal Power Com., 131 F. 2d 953 (C. A. 2)	27
Henderson v. United States, 339 U. S. 816	74
Houfburg v. Kansas City Stock Yards Co. of Maine, 283 S. W. 2d 539 (Mo.)	36
Humphrey's Executor v. United States, 295 U. S. 602	57
Interstate Com. Comm. v. Louisville & Nash. R. R., 227 U. S. 88	36, 65
Interstate Commerce Comm. v. Parker, 326 U. S. 60	57, 64
Kelly v. Union Stockyards & Transit Co. of Chicago, 190 F. 2d 860 (C. A. 7)	50, 51, 66

Cases—Continued

	Page
Lawlor v. *National Screen Service Corporation*, 238 F. 2d 59 (C. A. 3)	83
Louisville & Nash. R. R. v. *United States*, 238 U. S. 1	53
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457	57
McLean Trucking Co. v. *United States*, 321 U. S. 67	22, 76, 79
Midwest Farmers v. *United States*, 64 F. Supp. 91 (D. Minn.)	50, 68, 83
Mills v. *Green*, 159 U. S. 651	55, 56
Montana-Dakota Co. v. *Public Serv. Co.*, 341 U. S. 246	65
Morgan v. *United States*, 298 U. S. 468	1, 63, 73
Morgan v. *United States*, 304 U. S. 1	1, 73
Nashville Union Stockyards v. *Grissim*, 153 Tenn. 225, 280 S. W. 1015	57
National Broadcasting Co. v. *United States*, 319 U. S. 190	78
Osaka Shosen Line v. *United States*, 300 U. S. 98	57
Pennsylvania Water & Power Co. v. *Federal Power Com'n.*, 193 F. 2d 230 (C. A. D. C.)	78
Platt v. *Lecocq*, 158 Fed. 723 (C. A. 8)	53
Power Comm'n v. *Hope Gas Co.*, 320 U. S. 591	53
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177	64
Sprunt & Son v. *United States*, 281 U. S. 249	55
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38	29, 63
Stafford v. *Wallace*, 258 U. S. 495	24, 83
State of Colorado v. *United States*, 219 F. 2d 474 (C. A. 10)	26
Sugar Institute v. *United States*, 297 U. S. 553	23, 65, 84
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381	58
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	57
Swift & Co. v. *United States*, 343 U. S. 373	65
Swift & Co. v. *Wallace*, 105 F. 2d 848 (C. A. 7)	64
Tagg Bros. v. *United States*, 280 U. S. 420	35, 64, 66, 76
Trade Comm'n v. *Morton Salt Co.*, 334 U. S. 37	60
United States v. *American Trucking Ass'n*, 310 U. S. 534	51
United States v. *Automobile Workers*, 352 U. S. 567	61
United States v. *Detroit Navigation Co.*, 326 U. S. 236	57, 64
United States v. *Donahue Bros.*, 59 F. 2d 1019 (C. A. 8)	75
United States v. *Illinois Central R. R.*, 263 U. S. 515	25
United States v. *Interstate Commerce Com.*, 337 U. S. 426	74

Cases—Continued

Page

United States v. *Jones*, 336 U. S. 641 ..... 57, 64
United States v. *Leslie Sal' Co.*, 350 U. S. 383 51
United States v. *Morgan*, 307 U. S. 183 24
United States v. *Morgan*, 313 U. S. 409 ..... 60, 63
United States v. *Pierce Auto Lines*, 327 U. S. 515 60
United States v. *Wells-Fargo Express Co.*, 161 Fed. 606 (C. A. 7) 25
Virginian Ry. v. *United States*, 272 U. S. 658 72
Welch v. *Helvering*, 290 U. S. 111 62
Woerth v. *United States*, 231 F. 2d 822 (C. A. 8) 74
Woolford Realty Co. v. *Rose*, 286 U. S. 319 58

Regulations Issued by Stockyard Owners:

Billings Public Stockyards, Billings, Montana, Tariff 5 ..... 44, 45, 46
Bourbon Stock Yard Co., Louisville, Ky., Tariff 17 ..... 45, 47
Brighton Stock Yards Co., Brighton, Mass., Tariff 2 ..... 44, 46
Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7 ..... 45, 47
Farmers National Stock Yard Co., Muncie, Ind., Tariff 2 47
Fort Wayne Union Stock Yards Co., Tariff 6 46
Fort Worth Stock Yards Company (effective September 10, 1926) 41
Fort Worth Stockyards, Tariff 7 ..... 44, 45, 46
Greater Little Rock Stockyards, Tariff 1 ..... 44, 45, 46
Jonesboro Stockyards, Inc., Jonesboro, Arkansas, Tariff 2 ..... 43, 45, 46
Kansas City Stock Yards Co., Tariff 7 42
Kansas City Stock Yards Co., Tariff 12 ..... 42, 43, 46, 47
Los Angeles Union Stockyards Co., Tariff 16 ..... 43, 44, 45, 47
Milwaukee Stockyards, Tariff 3 ..... 44, 45, 47
Mississippi Valley Stockyards, St. Louis, Missouri, Tariff 8 ..... 44, 47
Nashville Union Stock Yards, Inc., Tariff 9 47
Oklahoma National Stock Yards Co., Tariff 12 ..... 45, 47
Old Union Stockyards Co., Spokane, Washington, Tariff 9 ..... 44, 45, 47
Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2 ..... 44, 45, 47
Pittsburgh Joint Stock Yards Co., Tariff 6 ..... 44, 45, 47
Port City Stock Yards Co., Inc., Houston, Texas, Tariff 4 ..... 44, 45, 46
Portland Union Stock Yards Co., Tariff 19 ..... 44, 45, 47

Regulations Issued by Stockyard Owners—Continued Page
Richmond Union Stock Yards Co., Tariff 9 ..... 44, 45, 47
Salt Lake Union Stock Yards, Tariff 8 ..... 44, 47
Seattle Union Stockyards Co., Tariff 1 47
Sioux Falls Stock Yards Co., Tariff 11 ..... 44, 45, 47
South Memphis Stock Yards Co., Tariff 11 ..... 44, 45, 47
South San Francisco Union Stockyards, Tariff 8 .. 44, 45, 47
Springfield Stock Yards Co., Springfield, Ill., Tariff 2 .. 47
St. Joseph Stock Yard Company (filed 1923) 41
St. Joseph Stock Yards Co., Tariff 20 ..... 44, 47
St. Louis National Stock Yards (Supp. No. 9 to Tariff No. 1, effective January 5, 1924) 41
St. Louis National Stockyards Co., Tariff 9 47
St. Paul Union Stockyards Co., Tariff 26 ..... 43, 46, 47
Stockton Union Stockyards, Stockton, California, Tariff 6 ..... 43, 44, 46, 47
Texarkana Stockyards, Inc., Texarkana, Texas, Tariff 3 47
The Belt Railroad & Stock Yards Co., Indianapolis, Indiana (filed 1922) 41
The Belt Rail Road and Stock Yards Co., Indianapolis, Indiana, Tariff 8 ..... 44, 45
The Buffalo Stock Yards, Tariff 11 ..... 44, 45, 46
The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2 ..... 44, 45, 46
The Cincinnati Union Stock Yard Co., Tariff 12 ..... 45, 46
The Cleveland Union Stock Yards Co., Tariff 8 ... 44, 45, 46
The Denver Union Stock Yard Co., Tariff 14 .. 44, 46, 47, 69
The Denver Union Stock Yard Company (Tariff effective 1923) 41
The Denver Union Stock Yard Co. (Tariff effective June 1, 1938) 42
The Detroit Stock Yards, Tariff 12 ..... 44, 45, 46
The Evansville Union Stock Yards Co., Tariff 10 .. 44, 45, 46
The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2 ..... 43, 44, 45, 46
The Jersey City Stock Yards, Inc., Tariff 2 46
The Joplin Stockyards, Inc., Joplin, Missouri, Tariff 3 ..... 44, 45, 46
The Ogden Union Stockyards Co., Tariff 12 ..... 43, 44, 47
The Peoria Union Stockyards Co. Inc., Tariff 11 .. 44, 45, 47
The Sioux City Stock Yards Company (effective 1928) .. 41
The Sioux City Stock Yards Co., Tariff 15 ..... 44, 45, 47

Regulations Issued by Stockyard Owners Continued
Page
The Union Stock Yard and Transit Co. of Chicago, Tariff 17 46
The Union Stock Yards Co., Dayton, Ohio, Tariff 6 .. 44, 45, 46
The Union Stock Yards Co., Springfield, Missouri, Tariff 3 ..... 44, 46, 47
The Wichita Union Stock Yards Co., Tariff 13 ... 44, 46, 47
Tulsa Stockyards, Inc., Tariff 4 ..... 44, 46, 47
Union Stock Yard & Market Co., New York, New York, Tariff 7 47
Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11 ..... 43, 44, 45, 46
Union Stock Yard Co. of Lancaster, Tariff 10 46
Union Stockyards Co. of Fargo, West Fargo, N. Dak., Tariff 7 ..... 44, 45, 46
Union Stock Yards Co. of Montgomery, Tariff 11 ..... 43, 44, 45, 47
Union Stock Yards Company of Omaha (filed 1923) .. 41
Union Stock Yards Company of Omaha, Tariff 17 .... 43, 47
Union Stock Yards, San Antonio, Texas, Tariff 13 ... 43, 45, 47
Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2 .. 44, 46, 47

Regulations Issued by Live Stock Exchanges:
Chicago Live Stock Exchange (filed February 14, 1924) 40
Denver Live Stock Exchange (revised 1924) 38, 39
Indianapolis Live Stock Exchange (filed 1923) 40, 41

Miscellaneous:
Agricultural Market Prices, Waite and Trelogan (2d ed., 1951) 70, 71
9 CFR, 1956 Supp., § 201.1 *et seq* 4
9 CFR, 1956 Supp., § 201.4 (a) 48
9 CFR (1st ed. 1939), § 201.16 and 1956 Supp., § 201.79 (a) 48
9 CFR (1st ed. 1939), §§ 201.16 and 201.17, and 1956 Supp., §§ 201.71–201.85 ..... 18, 48
9 CFR (1st ed. 1939), § 201.17, and 1956 Supp., § 201.82 48
9 CFR 1956 Supp., § 201.63 72
9 CFR, 1956 Supp., § 201.79 (b) 18, 48
9 CFR § 202.5 *et seq* 5
9 CFR § 202.6 (b) 5, 9

Miscellaneous—Continued

	Page
9 CFR (1st ed.) § 204.1	25
Dougherty v. *Union Stock Yard & Transit Co.*, 13 Agr. Dec. 239	49
Farmers Union Livestock Ass'n v. *St. Paul Union Stockyards*, 12 Agr. Dec. 1026	49
10 F. R. 13769	1
11 F. R. 177A-233	1
18 F. R. 3219, 3648	1
19 F. R. 74	1
Flynn v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14	15, 30, 49
Gilbert R. Smith v. *Union Stockyards Co.*, 9 Agr. Dec. 588	49, 50
H. Rept. No. 77, 67th Cong., 1st Sess	21, 35, 75
Illinois Packing Co. v. *Union Stock Yard & Transit Co.*, 15 Agr. Dec. 1101, decision on reconsideration, 16 Agr. Dec. 305	15, 30
In re Denver Union Stock Yard Company, 10 Agr. Dec. 1033	25, 28, 33
In re Market Agencies at Sioux City Stockyards, 9 Agr. Dec. 4	33, 37, 40, 72
In re Producers Livestock Mktg. Assn., 14 Agr. Dec. 109	49
In re St. Louis National Stockyards Co., 2 Agr. Dec. 664	33, 34
Livestock Market News Statistics 1956 (Statistical Bulletin No. 209, U. S. Department of Agriculture	28
Livestock Marketing, Dowell and Bjorka	28
Marketing, 1954 Yearbook of Agriculture (U. S. Department of Agriculture)	27, 32, 34, 70, 71
Marketing Farm Products, Shepherd (3rd ed. 1952)	71
34 Op. Atty. Gen. 267	29, 39
P. & S. Docket for May 1957	31
P. & S. Docket for June 1957	31
Producers Livestock Marketing Association v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188	43
Sen. Doc. No. 8, 77th Cong., 1st Sess	1
Suggestions for Improving Services and Facilities at Public Terminal Stockyards (United States Department of Agriculture, 1952)	29, 30, 67, 82
The Marketing of Livestock and Meat, Fowler (1957 ed.)	27, 32, 33, 34, 70
Webster's New International Dictionary (2d ed.)	68

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

PRIOR OPINIONS

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 77–84) is reported in 241 F. 2d 192. The decision of the Judicial Officer[1] in

[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to the Judicial Officer. 10 F. R. 13769; 11 F. R. 177A–233; 18 F. R. 3219, 3648; 19 F. R. 74. The delegation was originally authorized by Congress (Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 1952 ed. § 516a *et seq.*) as a result of *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, and is in accordance with the recommendation of the Attorney General's Committee on Administrative Procedure in Government Agencies (S. Doc. No. 8, 77th Cong., 1st sess., p. 53).

the United States Department of Agriculture (R. 6–33) is reported in 15 Agr. Dec. 638.

JURISDICTION

The judgment of the Court of Appeals (R. 84) was entered on February 15, 1957. The petition for a writ of certiorari was filed on May 8, 1957, and was granted on June 3, 1957 (R. 88). The jurisdiction of this Court is invoked under 5 U. S. C. 1952 ed. § 1040 and 28 U. S. C. 1952 ed. § 1254 (1). It is provided, *inter alia,* in 5 U. S. C. 1952 ed. § 1040, that "[e]ither the United States or the agency or an aggrieved party may file such petition for a writ of certiorari." The Secretary of Agriculture is authorized to participate "as of right" in the litigation and be independently represented by counsel. 5 U. S. C. 1952 ed. § 1038.

THE STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS

The petition for judicial review of the administrative decision by the Judicial Officer in the United States Department of Agriculture is based on the so-called Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*), and the administrative decision thus subjected to judicial review is based on the Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*).

A. THE PACKERS AND STOCKYARDS ACT

The Packers and Stockyards Act regulates, *inter alia,* the marketing of livestock at those stockyards which are "posted" by the Secretary of Agriculture,

i. e., determined by the Secretary to be within the statutory definition of a "stockyard" in 7 U. S. C. 1952 ed. § 202 (a). The Act prohibits a market agency or dealer from engaging in business at a posted stockyard unless the market agency or dealer is registered with the Secretary. 7 U. S. C. 1952 ed. § 203.

A "market agency" is defined in the Act as "any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." 7 U. S. C. 1952 ed. § 201 (c). The statutory term "stockyard services" is defined as "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b). The term "dealer" is defined in the Act as "any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser." 7 U. S. C. 1952 ed. § 201 (d). The term "stockyard owner" as defined in the Act means "any person engaged in the business of conducting or operating a stockyard." 7 U. S. C. 1952 ed. § 201 (a).

It is "the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *." 7 U. S. C. 1952 ed. § 205. It is also "the duty of every stockyard owner and

market agency to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. 1952 ed. § 208.

Whenever, after a "full hearing upon a complaint * * * the Secretary is of the opinion that any * * * regulation * * * of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary may "determine and prescribe * * * what regulation * * * is or will be just, reasonable, and non-discriminatory to be thereafter followed" and may, by order, require the stockyard owner or market agency to "conform to and observe the regulation or practice so prescribed." 7 U. S. C. 1952 ed. § 211.

The Secretary is authorized to issue "such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter * * *." 7 U. S. C. 1952 ed. § 228.

The relevant provisions in the Act are set forth in the Appendix, *infra,* pp. 86–97.

B. THE ADMINISTRATIVE REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

The regulations issued by the Secretary relate, *inter alia,* to the posting of stockyards, the registration of market agencies and dealers, and the facilities and services at posted stockyards. 9 CFR, 1956 Supp., § 201.1 *et seq.* The rules of practice issued by the Sec-

retary relate, *inter alia,* to disciplinary and other adjudicatory proceedings. 9 CFR § 202.5 *et seq.*

It is provided in the rules of practice, under the Packers and Stockyards Act, that a formal complaint may be filed by an interested person and "if the Administrator should so determine, a proceeding filed pursuant to section 304 of the Act [*i. e.,* 7 U. S. C. 1952 ed. § 205] or a proceeding involving the application of a regulation established or filed pursuant to section 307 of the Act [*i. e.,* 7 U. S. C. 1952 ed. § 208] may be instituted upon the moving paper filed by the person who filed the informal complaint." 9 CFR § 202.6 (b).

C. THE PROVISIONS IN THE HOBBS ACT

"[A]ll final orders" of the Secretary of Agriculture "made under the Packers and Stockyards Act, 1921, as amended, * * * except orders issued under sections 210 (e), [and] 217a * * *" are subject to judicial review under the so-called Hobbs Act. Act of December 29, 1950, 64 Stat. 1130, 5 U. S. C. 1952 ed. § 1032. The exceptions relate only to final orders awarding damages (7 U. S. C. 1952 ed. § 210 (e)) and to final orders relating to brand inspection (7 U. S. C. 1952 ed. § 217a). This Act supersedes the review procedure formerly applicable under the Urgent Deficiencies Act of 1913, as amended (Act of October 22, 1913, 38 Stat. 220; 28 U. S. C. 1952 ed. §§ 2321–2325) with respect to orders of the Interstate Commerce Commission and made applicable to orders under the Packers and Stockyards Act by § 316 of the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 217). Section 316 of the Packers and Stockyards Act (7 U. S. C. 1952 ed.

§ 217) has been repealed only to the extent that it is inconsistent with the Hobbs Act. Act of December 29, 1950, § 13, 64 Stat. 1132.

Jurisdiction is vested in the Court of Appeals by the terms of the Hobbs Act (5 U. S. C. 1952 ed. § 1032), and in the Supreme Court on a petition for certiorari (5 U. S. C. 1952 ed. § 1040). The record on which the administrative order is based is certified, by the Secretary, to the Court of Appeals for the purpose of judicial review. 5 U. S. C. 1952 ed. § 1036. The Secretary of Agriculture may participate "as of right," on judicial review, and be independently represented by counsel. 5 U. S. C. 1952 ed. § 1038. "Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari." 5 U. S. C. 1952 ed. § 1040.

QUESTIONS PRESENTED

The regulations, issued by the owner of the terminal stockyards in Denver, relate to the furnishing of stockyard services at that market. The regulations were challenged in the administrative proceeding by a market agency, but no evidence was adduced as to whether the regulations are unreasonable. The market agency, as the complainant in the administrative proceeding, elected to present no evidence and to submit its case on the proposition that the regulations are, as a matter of law, illegal on their face. A stockyard owner and market agency are obligated—under the Packers and Stockyards Act—"upon reasonable request" to furnish "reasonable stockyard services" at a stockyard which is regulated under the Packers and

Stockyards Act, and a stockyard owner and market agency are also required by the Act to establish, observe, and enforce reasonable and non-discriminatory regulations with regard to the furnishing of "reasonable stockyard services." The questions presented are:

(1) Whether the regulations are, as a matter of law, illegal on their face because in a certain hypothetical situation referred to by the Court of Appeals the regulations would seem to be unreasonable.

(2) Whether the regulations are, as a matter of law, illegal in their entirety because as held by the Court of Appeals in a certain hypothetical situation a significant part of the regulations would be unreasonable.

(3) Whether in the total absence of any evidence to show that the regulations are unreasonable the regulations are, as a matter of law, unreasonable and the administrative agency is required, as a matter of law, to issue a cease and desist order with respect to the regulations.

STATEMENT

A. THE ADMINISTRATIVE PROCEEDING AND DECISION

The complaint was filed with the Secretary of Agriculture by the Producers Livestock Marketing Association, a market agency at the Denver Union stockyard, and it is alleged in the complaint that certain regulations issued by the Denver Union Stock Yard Company are invalid under the Packers and Stockyards Act (R. 39–42). The prayer in the complaint is that the regulations be set aside and annulled (R. 42). The contested regulations issued by the stockyard owner provide that (R. 12, 39–40, 44):

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not

apply on livestock solely used for breeding purposes.

It was administratively determined, under the procedural regulations (9 CFR § 202.6 (b)), that the "complaint should be entertained as the moving paper initiating a proceeding [by the Producers Livestock Marketing Association, as the complainant, against the Denver Union Stock Yard Company, as the respondent in the administrative proceeding] under the rules applicable to disciplinary proceedings * * *" pursuant to the Packers and Stockyards Act (R. 61).

In the answer filed, in the administrative proceeding, by the Denver Union Stock Yard Company it is admitted that the Company issued the regulations (R. 44), and it is alleged, *inter alia,* that the regulations are necessary to enable the stockyard owner "to furnish, upon reasonable request, without discrimination, reasonable stockyard services * * * and to enable the patrons of the Denver Union stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services * * *" (R. 46). It is also alleged in the answer that the practices of the Producers Livestock Marketing Association and some others are contrary to the duties and responsibilities of such registrants at this market and that the regulations are necessary in order to effectuate just, reasonable, and non-discriminatory practices at the Denver market (R. 44–47). The prayer in the answer is that the Stock Yard Company "be granted an oral hearing * * * and that the complaint be dismissed" (R. 47–48).

The Denver Union Stock Yard Company, the re-

spondent in the administrative proceeding, filed a motion—in preparation for the administrative hearing—to require the Producers Livestock Marketing Association to produce, for examination and copying, certain books and records identified in the motion and alleged to be relevant and necessary in order to show that the contested regulations are reasonable and relate only to the performance of reasonable stockyard services (R. 48–51).

In opposing the motion by the Stock Yard Company for the production of certain books and records of the complainant, the Producers Livestock Marketing Association filed an election "to stand upon the illegality of said regulation[s], as a matter of law," and contended that the regulations are illegal and invalid upon their face (R. 72). It was stated by the Producers Livestock Marketing Association, in its "Election to Rest," that "it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law," and it was stated that the complainant "hereby rests and submits its case for final decision by the Secretary of Agriculture" (R. 72).

The Hearing Examiner was of the opinion that the proceeding, in these circumstances, should be "certified to the Judicial Officer for decision, with a recommendation that it be dismissed" (R. 73). The Judicial Officer concluded that upon the limited record before him he could not find that the contested regulations of the Denver Union Stock Yard Company, the respondent in the administrative proceed-

ing, are invalid upon their face, and, accordingly, he dismissed the complaint (R. 6, 33). It was made plain in the decision by the Judicial Officer that the issue for decision is not the broad question as to whether the regulations are under the relevant facts and circumstances valid or invalid, but only the narrow question as to whether the regulations are as a matter of law invalid on their face (R. 16).

B. THE PROCEEDING AND DECISION IN THE COURT OF APPEALS

The Producers Livestock Marketing Association filed a petition in the Court of Appeals to review the decision of the Judicial Officer (R. 1–5). The United States and the Secretary of Agriculture were designated as the respondents in the Court of Appeals (R. 1–5) and the Denver Union Stock Yard Company intervened as a respondent in the Court of Appeals (R. 33–34).

The Court of Appeals concluded that the regulations are violative of the statutory requirement that a stockyard owner or market agency shall, upon reasonable request, furnish reasonable stockyard services at a posted stockyard (R. 77–84). "The compulsion of the regulation," said the Court of Appeals, "is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from ren-

dering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another" (R. 82). "Although it may be argued," said the Court of Appeals, "that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, even if proved to be soundly based in fact, has no legal significance" (R. 82).

The Court of Appeals was of the opinion that the regulations are an unlawful restriction upon "the statutory rights and duties of petitioners and all market agencies" and bear "no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act" and are invalid (R. 83–84). The Court of Appeals remanded the proceeding to the Secretary of Agriculture with directions to issue a cease and desist order against the issuance or enforcement of the regulations by the stockyard owner (R. 84).

SUMMARY OF ARGUMENT

The issues relate to certain regulations issued by the Denver Union Stock Yard Company pursuant to the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 181 *et seq.*). The contested regulations provide that "[n]o market agency or dealer engaging in business at this Stock Yard shall, upon Stock Yard Company prop-

erty, or elsewhere, nor shall any other person upon Stock Yard Company property * * * [s]olicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere" or divert livestock from this market which would otherwise normally come to this market or interfere with the normal flow of livestock to this market (R. 12, 39). The "normal marketing area", as to which the regulations are applicable, is defined in the regulations as being the State of Colorado with certain counties or areas therein excepted (R. 12, 39).

No evidence was received in the administrative proceeding. The complaint was filed by the Producers Livestock Marketing Association, a market agency at the Denver stockyards, and as the complainant in the administrative proceeding it elected to stand upon the illegality of the regulations "as a matter of law," and contended that the regulations are invalid on their face (R. 72). It was stated by the complainant in the administrative proceeding that it would not present evidence in the proceeding and it submitted "its case for final decision by the Secretary of Agriculture" (R. 72). The "Election to Rest," filed by the complainant in the administrative proceeding, was subsequent to the filing of a motion by the Denver Union Stock Yard Company—the respondent in the administrative proceeding—to require the complainant to produce, for examination and copying, certain books and records identified in the motion and alleged to be relevant and necessary in order to enable the Stock Yard Company to show, at the hearing, that the contested

regulations are reasonable and relate only to the performance of reasonable stockyard services (R. 48–51).

I

A. The regulations relate to the furnishing of stockyard services and are not, as a matter of law, unreasonable so as to be violative of the statutory requirement for the furnishing of "reasonable stockyard services" (7 U. S. C. 1952 ed. §§ 205 and 208). It is the "duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *." 7 U. S. C. 1952 ed. § 205. Although the term "stockyard services" is defined in the Act, there is, however, no statutory definement of the word "reasonable" as used in the term "reasonable stockyard services." The statute merely provides that the term "stockyard services" means "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b).

Inasmuch as the duty to furnish "reasonable stockyard services" is described in general terms, without more, the duty is imposed on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services." 7 U. S. C. 1952 ed. § 208. Pursuant to that requirement of the Act the Denver Union Stock Yard Company, as the owner of the stockyard, issued the regulations which are contested by a market agency, the respondent in this Court.

B. The business activities which are referred to in the term "reasonable stockyard services" are of such broad and variable character that the statutory term is manifestly without rigid and fixed meaning as a matter of law. The stockyard services will necessarily vary from market to market, depending on the local circumstances. There are 571 stockyards posted for regulation under the Act, and some of the stockyards are great terminal markets and some are relatively small auction markets. The stockyard services will necessarily vary depending on whether it is cattle or sheep or swine or horses or mules or goats that are being marketed—the term "livestock" as used in the Act means "cattle, sheep, swine, horses, mules, or goats * * *" (7 U. S. C. 1952 ed. § 182 (4)). The stockyard services will vary from market to market, and in addition there are variables in each market, *e. g.*, abnormal weather conditions (*Illinois Packing Co.* v. *Union Stock Yard & Transit Company*, 15 Agr. Dec. 1101, 1106–1110 and 16 Agr. Dec. 305, 306–309; *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 24–25).

There can be no doubt that the stockyard services to be furnished with respect to the "receiving" of livestock, the "feeding" of livestock, the "watering" of livestock, the "holding" of livestock, the "delivery" of livestock, and the "handling" of livestock are not to be interpreted, as a matter of law, in an abstract, sterile way but in view of the facts in a particular case. Similarly, the services to be furnished by a stockyard owner or market agency with respect to the "buying" of livestock, the "selling"—

on a commission basis or otherwise—of livestock, and the "marketing" of livestock also have their rootage in the facts. For example, the buying, selling, and marketing of livestock at a terminal market are significantly different, in various respects, from the buying, selling, and marketing of livestock at auction markets. In addition, the methods of sale at the auction markets are not uniform.

The stockyard services to be furnished in a particular market are different from the requisite services 36 years ago at the time of the enactment of this statute. New developments in transportation and communication since 1921 have had a pronounced impact on our marketing system. The terms of the statute call for a continuous process of application, and the application of the term "reasonable stockyard services" with respect to the selling, buying, and marketing of livestock at a posted market, under this Act, cannot be determined by mere verbality as a matter of law.

The structure and purpose of the Act show that the application of the term "reasonable stockyard services" is dependent on the relevant factual circumstances. The broad scope of the regulations by a stockyard owner is underscored by the reference in the Act to regulations by a stockyard owner which are "for or in connection with" the furnishing of reasonable stockyard services. 7 U. S. C. 1952 ed. § 211. The business practices which are "in connection with" the furnishing of services at a stockyard are not further described or identified in the Act and are to be

determined in view of their relevance and significance in the current of livestock marketing.

The owner of a stockyard is allowed—within the zone of reasonableness—to have supervision over the services and facilities in the owner's business. The Secretary is authorized, however, to prescribe regulations which must be observed if he decides "after full hearing" that "any * * * regulation or practice of a stockyard owner or market agency * * * is or will be unjust, unreasonable, or discriminatory * * *." 7 U. S. C. 1952 ed. § 211.

The long established administrative practice under the Act supports the view that the relevant facts—in the business areas involved—must be considered and evaluated in determining whether the regulations in this case are "unreasonable" so as to be violative of the statutory provisions. Many regulations—which have been made effective since the statute was enacted in 1921—reveal the efforts by the industry and by the Secretary to apply the statutory terms to the complexities in this great current of business. Numerous regulations have been made effective with respect to the solicitation of business by market agencies or dealers. Various terminal stockyards have regulations which are similar to the contested rules of the Denver Union Stock Yard Company. Many terminal stockyards have regulations in effect to prohibit market agencies and dealers from engaging in various business activities in certain areas of the stockyards or in certain areas adjacent to the stockyards. Many terminal stockyards provide that stock-

yard services will be furnished only to a "reasonable number" of market agencies and dealers, and it is the general practice to deny stockyard services to a market agency or dealer who engages in unfair, dishonest, or fraudulent practice or who destroys stockyard property or who engages in other proscribed activities. The regulations issued by the Secretary also manifest the administrative practice of interpreting the terms of the Act on the basis of the factual circumstances in each market. See *e. g.*, 9 CFR, 1956 Supp., § 201.79 (b), 9 CFR (1st ed. 1939) §§ 201.16–201.17 and 1956 Supp., §§ 201.71–201.85. The adjudicatory decisions by the Judicial Officer also reveal that the statutory terms are general standards which, in order to have practicality, must be applied on the basis of the different and changing circumstances in a huge and complex industry.

C. The Court of Appeals disposed of the case on the basis of the Court's assumptions of fact, *viz.*, (1) that a market agency at Denver is also a registrant at another posted stockyard which is competitive with the one in Denver, and (2) that "by rendering a reasonable service for a Colorado customer at one stockyard" it is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard (R. 82). The Court of Appeals concluded that the "compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every*

stockyard where they do business" (R. 82). The decisiveness of that holding by the Court of Appeals is revealed by its explanation that "[a]lthough it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, even if proved to be soundly based in fact, has no legal significance" (R. 82).

The Court's opinion is based only on the supposal set forth in its opinion. There is nothing in the record to support the Court's hypothesis. It would of course require an inquiry into the facts to determine whether, in the Court's hypothesis, the hypothetical market agency was "rendering a *reasonable* [emphasis supplied] service for a Colorado customer at one stockyard" in the situation which was undisclosed in the Court's assumption of facts, and it would also require an inquiry into the facts to determine whether the particular market agency would be prohibited by the regulations "from rendering *reasonable* service for the *same or a different* [emphasis supplied] Colorado customer at another stockyard" in whatever the factual situation is to which the Court alludes (R. 82).

The holding by the Court of Appeals is squarely in conflict with *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, in which it was held that courts in passing on the validity of a regulation, under an Act of Congress, are to dispose of the case "upon the

basis of the facts disclosed," never on the basis of "nonexistent and assumed circumstances." It is not for the Secretary or the courts to determine what the terms of the Act may require upon supposable facts, but to adjudge the issues upon existing facts.

The principle which was applied in *Associated Press* v. *Labor Board, supra,* is particularly forceful with respect to statutory terms of generality and adaptability such as those in the case at bar. To interpolate into the statutory provisions in the Packers and Stockyards Act a provision that the regulations must be reasonable as applied to artificial, hypothetical, or assumed circumstances would so obviously effectuate the enfeeblement and devitalization of the Act that it cannot be accepted as a proper interpretation of the purpose of Congress.

The regulations apply to dealers as well as to market agencies, but the Court of Appeals nullified the regulations *in toto* even though the assumed case, in the Court's opinion, relates only to a market agency and the statutory provision relied on by the Court refers only to stockyard owners and market agencies. Assuming, *arguendo,* that the regulations are invalid as to market agencies, nonetheless the regulations should not have been declared invalid as to dealers also, and the Court should have remanded the case to the Secretary for further proceedings in accordance with the Act and the Court's opinion. *Federal Power Com.* v. *Idaho Power Co.,* 344 U. S. 17, 20; *Federal Comm'n* v. *Broadcasting Co.,* 309 U. S. 134, 141–146. If the regulatory provisions are, in whole or in part, unreasonable the Secretary may, under

the Act, determine and prescribe what regulations are or will be reasonable to be thereafter followed and observed by market agencies or stockyard owners. 7 U. S. C. 1952 ed. § 211.

The reasonableness of rates and regulations, under the Act, depends on the evidence. In the total absence of any evidence to show that the regulations are unreasonable, the Court of Appeals erred in holding that the regulations are, as a matter of law, unreasonable and in requiring the administrative agency to issue a cease and desist order with respect to the regulations.

On the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, the administrative agency will be free to take whatever action, if any, is appropriate with respect to the contested regulations. The Secretary may on his own motion institute an investigation or a hearing as to the validity of the regulations. 7 U. S. C. 1952 ed. §§ 210 (e) and 222. The Secretary has full authority to take such further action as, in his discretion, is appropriate.

II

This proceeding is based on the Packers and Stockyards Act, and the validity of the regulations must be determined by the provisions of this statute. The Packers and Stockyards Act is an integrated and inclusive statute fully dealing with all aspects of the stockyard industry. See H. Rept. No. 77, 67th Cong., 1st sess., p. 2. Specifically, the Act provides for complete regulation with respect to the rates charged

by a stockyard owner. 7 U. S. C. 1952 ed. §§ 206, 207, 209, 210, 211, 212. In view of the comprehensive plan, in the Packers and Stockyards Act, for the regulation of the stockyard industry, including regulation "with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*McLean Trucking Co.* v. *United States,* 321 U. S. 67, 85), the regulations in this case must be tested by the standards of the Packers and Stockyards Act, and the Act should be construed "in the light of the special considerations that have influenced Congress to make specific provision for the particular industry." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U. S. 86, 98.

The Judicial Officer properly concluded that he was unable to determine whether the regulations are invalid inasmuch as the record is lacking "in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter" (R. 30).

Issues such as those in this case must be determined upon the basis of the relevant facts. For example, in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238, the Court held that to determine whether a rule prohibiting members of the Chicago Board of Trade from engaging in certain types of purchases

at a price other than the closing bid on the Exchange required a consideration of the "facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." Questions of reasonableness "are necessarily questions of relation and degree" and, therefore, "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *United States,* 297 U. S. 553, 600. See, also, *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. There are no facts in this record which afford a basis for a conclusive presumption or even an inference that the regulations are illegal. The validity of the regulations can be determined only on the basis of evidence, and the record here fails to afford that basis.

ARGUMENT

I. THE REGULATIONS RELATE TO THE FURNISHING OF STOCKYARD SERVICES AND ARE NOT, AS A MATTER OF LAW, UNREASONABLE SO AS TO BE VIOLATIVE OF THE STATUTORY REQUIREMENT FOR THE FURNISHING OF "REASONABLE STOCKYARD SERVICES"

A stockyard owner is required by the Packers and Stockyards Act to issue regulations and establish practices with respect to the furnishing of stockyard services. The issues in the case converge on the words of the Act.

A. A STOCKYARD OWNER IS REQUIRED BY THE PACKERS AND STOCKYARDS ACT TO ISSUE, OBSERVE, AND ENFORCE REGULATIONS WITH REGARD TO THE FURNISHING OF "REASONABLE STOCKYARD SERVICES" UPON "REASONABLE REQUEST"

The statutory requirement for the furnishing of "reasonable stockyard services" by stockyard owners

and market agencies is a pivotal provision in the Packers and Stockyards Act. 7 U. S. C. 1952 ed. §§ 205 and 208. The "dominant purpose" of the Act is "to secure to patrons of the stockyards *prescribed stockyard services* at just and reasonable rates" (emphasis supplied). *United States* v. *Morgan,* 307 U. S. 183, 188–189. "[A]ll *practices* in connection with the livestock passing through the yards shall be just, reasonable, non-discriminatory and non-deceptive" (emphasis supplied). *Stafford* v. *Wallace,* 258 U. S. 495, 513–514.

Specifically, it is the "duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *." 7 U. S. C. 1952 ed. § 205. Although the term "stockyard services" is defined in the Act, there is, however, no statutory definement of the word "reasonable" as used in the term "reasonable stockyard services." The statute merely provides that the term "stockyard services" means "services or facilities furnished at a [posted] stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b).

Inasmuch as the duty to furnish "stockyard services" is not absolute or unqualified but is limited to the furnishing of "reasonable stockyard services" upon "reasonable request" and, also, the services

thus referred to are described in general terms, without more, the additamentary duty is imposed on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services" at a posted market[2] (7 U. S. C. 1952 ed. § 208). Pursuant to that requirement of the Act, the Denver Union Stock Yard Company, as the owner of the posted stockyard in Denver,[3] issued the regulations which are contested by a market agency,[4] the respondent in this Court.

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[2] The cardinal purpose, in this respect, is that "reasonable stockyard services" shall be furnished on "reasonable request." The statutory reference in 7 U. S. C. 1952 ed. §§ 205 and 208 to the furnishing of stockyard services without discrimination plainly means that the services are to be furnished without unreasonable or unjust discrimination. The word "discrimination" without a qualifying adjective such as "unjust" means unjustly, unreasonably, or unduly discriminatory. *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, 610 (C. A. 7), affirmed, *sub nom. American Express Co.* v. *United States*, 212 U. S. 522. See, also, *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 521.

[3] The Denver Union Stock Yard Company "is a corporation that owns and operates the Denver Union Stockyards * * *," a stockyard posted under the Packers and Stockyards Act (R. 11). The Denver stockyard has been a "posted market" since November 1, 1921, under the Packers and Stockyards Act. 9 CFR (1st ed. 1939) § 204.1. See, also, *In re Denver Union Stock Yard Company*, 10 Agr. Dec. 1033.

[4] The Producers Livestock Marketing Association, the respondent in this Court, is registered with the Secretary "as a market agency to buy and sell livestock on a commission basis at the Denver Union Stockyards, Denver, Colorado, a stockyard posted" under the Packers and Stockyards Act (R. 11).

B. THE STATUTORY CRITERIA ARE TERMS OF GENERAL IMPORT TO BE APPLIED TO DIVERSIFIED FACTUAL SITUATIONS

1. *The business activities which are referred to in the term "stockyard services" are of such broad and variable character that the statutory term "reasonable stockyard services" is manifestly without rigid and fixed meaning as a matter of law*

The significant words of the Act are variables affected by facts and circumstances. To be sure, it is the duty of a stockyard owner or market agency to furnish "reasonable stockyard services" but the "services" or "facilities" which must be furnished, within the zone of reasonableness, are not self-defining terms. The Congress could not foresee every contingency in the marketing of livestock at the many stockyards throughout the Nation; and in prescribing the stockyard services to be furnished by a stockyard owner or a market agency the significant terms of the Act are of general import.

The definition of "stockyard services" refers at the outset to "services or facilities furnished at a stockyard * * *." 7 U. S. C. 1952 ed. § 201 (b). But the words "services or facilities" are without definition. It has been held that a "service," under the Packers and Stockyards Act, is any result of useful labor which does not produce a tangible commodity. *State of Colorado* v. *United States,* 219 F. 2d 474, 476 (C. A. 10). "[T]he word 'facilities'", as used in a regulatory measure, "is generally regarded as a widely inclusive term, embracing anything which aids or makes easier the performance of the activities involved in the business of a person

* * *." *Hartford Electric Light Co.* v. *Federal Power Com.*, 131 F. 2d 953, 961 (C. A. 2), certiorari denied, 319 U. S. 741.

Reasonable "services" and reasonable "facilities"—*i. e.*, "reasonable stockyard services"—must be furnished by a stockyard owner and a market agency with respect to (1) the "receiving" of livestock, (2) the "buying" of livestock, (3) the "selling"—on a commission basis or otherwise—of livestock, (4) the "marketing" of livestock, (5) the "feeding" of livestock, (6) the "watering" of livestock, (7) the "holding" of livestock, (8) the "delivery" of livestock, (9) the "shipment" of livestock, (10) the "weighing" of livestock, and (11) the "handling" of livestock. 7 U. S. C. 1952 ed. § 201 (b). These statutory terms are applicable to a wide variety of market conditions. Some of the stockyards are great terminal markets, and some are relatively small auction markets. A large terminal stockyard is a complex business enterprise. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 190–193. It represents a large investment in land, buildings, and equipment. *Ibid.* "The main livestock terminals are South St. Paul, Sioux City, Omaha, Denver, Milwaukee, Chicago, Indianapolis, East St. Louis, St. Joseph, Kansas City, Wichita, and Fort Worth." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 41.[5] The size of the Denver market is revealed by these data as to the livestock received by

[5] The author of this article in the *1954 Yearbook of Agriculture* is Dr. Edward A. Duddy, Professor of Marketing (Emeritus), University of Chicago.

it in 1956: Cattle, 881,697; calves, 81,756; hogs, 569,559; sheep and lambs, 883,264. *Livestock Market News Statistics*, 1956 (Statistical Bulletin No. 209, U. S. Department of Agriculture), p. 15. See, also, *In re Denver Union Stockyard Company*, 10 Agr. Dec. 1033, 1038–1072. In addition to the terminal stockyards there are many other stockyards which are posted under the Act.

The "services" or "facilities" will necessarily vary depending on whether it is cattle or sheep or swine or horses or mules or goats that are being marketed. The term "livestock" as used in the Packers and Stockyards Act means "cattle, sheep, swine, horses, mules, or goats—whether live or dead" (7 U. S. C. 1952 ed. § 182 (4)), and different "services" and different "facilities" are necessary, in some respects, with respect to the different species of livestock. In a terminal stockyard, "[s]heep and hogs are usually housed in single or double-deck covered buildings. Covered buildings are desirable for protecting these species from unfavorable weather and for ensuring buyers of sheep and lambs that the fleeces are free from excess moisture. The sheep pens are equipped with water troughs, hay racks, and troughs for grain, and the hog pens are equipped with water troughs and sprinklers for showering during the heat of the summer. Hogs that are fed prior to sale are given shelled corn, which is usually scattered on the floor of the pen." Dowell and Bjorka, *Livestock Marketing*, pp. 106–107. Another example is in the marketing of hogs. "The hog inspection and dockage serv-

ice is a service or facility furnished at a stockyard" under the definition of "stockyard services" in the Packers and Stockyards Act. 34 *Op. Atty. Gen.* 267, 273–274 (opinion by Attorney General Stone, later Mr. Justice Stone). "Hog dockage is the amount that is deducted from the actual weight of a particular hog or number of hogs or some or all of them as an allowance to the buyer on account of the condition of the hog or hogs in question. * * * The rules of the Chicago Livestock Exchange" at the terminal stockyards in Chicago provided for the inspection and dockage of hogs at the Chicago market. *Id.* at 268–269. Also "services" for cattle received by rail are different from the "services" for cattle received by motor truck, and on the basis of "detailed testimony" as to the factual circumstances different rates may, accordingly, be reasonable. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 69.

The facilities and services vary from market to market. In all respects "local conditions control the final arrangement and design of facilities and methods of operating. Each yard presents an individual problem due to the topography, size, shape, and location of its lands, the fixed surroundings, such as streets, railroad tracks, and packing plants, the climatic conditions, the receipts and dispositions by species and market classes, modes of transportation, hours of arrival, sizes of consignment, sizes of the scale drafts, and other related factors." *Suggestions for Improving Services and Facilities at Public*

Terminal Stockyards (U. S. Department of Agriculture, 1952), p. 2. See, also, Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 238–241.

The circumstances vary from market to market, and in addition there are variables in a particular market. Abnormal weather conditions, for example, should be considered by a stockyard owner in the discharge of his duty to furnish "reasonable stockyard services" with respect to the "holding" of the livestock—"holding" is one of the terms in the statutory definition of "stockyard services." *Illinois Packing Co.* v. *Union Stock Yard & Transit Co.*, 15 Agr. Dec. 1101, 1106–1110, decision on reconsideration, 16 Agr. Dec. 305, 306–309. If cattle "in holding pens at the stockyard were in distress from overheating," it was the duty of the stockyard owner to provide reasonably adequate cover, space, and water to protect the cattle. *Ibid.* On failure to furnish the "reasonable stockyard services," in circumstances of abnormal weather, the stockyard owner is liable for the loss of the cattle. *Ibid.* What is reasonable, in view of abnormal weather, depends of course on the facts. A flood in 1951 "inflicted serious damage to the physical property of the stockyard company [in Kansas City] and reduced its capacity to handle cattle receipts at its stockyard." *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 24–25. The failure to make "services" or "facilities" available is not a failure to furnish "reasonable stockyard services" if the demand exceeds the reasonable capacity of the stockyard. *Ibid.*

There can be no doubt that the "services" and "fa-

cilities" to be furnished by a stockyard owner with respect to the "receiving" of livestock, the "feeding" of livestock, the "watering" of livestock, the "holding" of livestock, the "delivery" of livestock, and the "handling" of livestock[6] are not to be interpreted, as a matter of law, in an abstract, sterile way, but in view of the facts of a particular case. The 571 stockyards which are regulated under the Packers and Stockyards Act vary in size from the great terminal markets—such as Chicago and Denver—to small stockyards with only 20,000 square feet available for the handling of livestock[7]—exclusive of runs, alleys, or passageways—and the "services" and "facilities" to be furnished as "reasonable stockyard services" should correspond to the characteristics and circumstances in each market.

The "services" and "facilities" to be furnished by a stockyard owner or market agency with respect to the

[6] These factors are in the definition of "stockyard services." 7 U. S. C. 1952 ed. § 201 (b).

[7] By definition, the term "stockyard" means "any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce," but it does not include "a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet." 7 U. S. C. 1952 ed. § 202 (a). Numerous stockyards have been posted for regulation. for the first time, in 1957. Compare, *e. g.*, *P & S. Docket for May 1957*, p. 3 with the *P. & S. Docket for June 1957*, p. 3 —these publications are issued by the Livestock Division, Agricultural Marketing Services, U. S. Department of Agriculture, in Washington, D. C.

"buying" of livestock, the "selling"—on a commission basis or otherwise—of livestock, and the "marketing" of livestock[8] also depend on the facts. The business practices or methods of buying, selling, and marketing livestock are not uniform at the posted stockyards under the Packers and Stockyards Act. "At terminal markets, market agency salesmen sell livestock received from producers on a consignment basis through direct negotiations with buyers. Livestock consigned to auction markets [*i. e.*, the other posted stockyards] is offered to buyers in sales rings and sold by auction methods." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 282. The "services" and "facilities" with respect to the buying, selling, and marketing of livestock at a terminal market are significantly different from the "services" and "facilities" at an auction market.[9] In addition, the methods of sale at the auction markets are not uniform. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 256–266. "There are three distinct methods used for selling livestock at auctions: (1) Single animals or a few animals of fairly uniform quality and size, consigned by the same person and combined into a lot, are sold by the head; (2) Single animals or a few animals of fairly uniform quality and size, consigned by the same person and combined into a lot, are sold by weight; and (3) Animals are

[8] These factors are in the definition of "stockyard services." 7 U. S. C. 1952 ed. § 201 (b).

[9] The advantages and disadvantages of marketing livestock at an auction market are matters of controversy. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 223–225.

graded, weighed, and sorted into lots of uniform quality and weight and are sold together, even if they belong to different consignors. The latter method is confined to hogs, lambs, and veal calves." *Ibid.*

The "stockyard services" to be furnished in a particular market are different, in some respects, from the requisite services at the time of the enactment of the Packers and Stockyards Act 36 years ago.[10] There has been a great increase, in recent years, in the volume of livestock received at the Denver market from motor trucks, and "[o]ne of the factors which appears to have been responsible for the increase in truck receipts at respondent's stockyards [*i. e.*, the terminal stockyards in Denver] has been the construction [by the owner of the stockyards] of cattle truck chutes on newly acquired land at which dock and pens have been constructed, and a viaduct constructed over the Burlington Railroad main line." *In re Denver Union Stockyard Company,* 10 Agr. Dec. 1033, 1062. The "services" are greater and more varied than at the time of the enactment of this legislative measure. *In re Market Agencies at Sioux City Stock Yards,* 9 Agr. Dec. 4, 19–103. New developments in transportation and communication since 1921, the date of the enactment of the Packers and Stockyards Act,

[10] "St. Louis had for many years a flourishing horse and mule market, largely conducted on respondent's premises [*i. e.*, the St. Louis National Stockyards]. Then the horse and mule facilities were used much more intensively than they are now. For nearly ten years the receipts of horses and mules decreased, the volume becoming so small" that by 1937 it was not earning operating costs. *In re St. Louis National Stockyards Co.*, 2 Agr. Dec. 664, 715.

have had a pronounced impact on our marketing system. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 26–27; *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), pp. 95, 101, 489. Other changes in our economy or way of doing business have also affected the business operations at the stockyards. *Ibid.* See, also, *In re St. Louis National Stockyards Co.*, 2 Agr. Dec. 664, 669–670.

The Congress did not undertake in 1921, in the enactment of this Act, to foresee in detail the "services" and "facilities" to be furnished, day by day, in each market. The Congress wisely selected words of general import, in the Act, and left their application to the factual circumstances in each case. The terms of the statute call for a continuous process of application; relevance and reasonableness are variable in relation to the divergent and mutable situations in the marketing of livestock in the various stockyards. The application of the term "reasonable stockyard services" with respect to the many factors incident to the selling, buying, and marketing of livestock at a posted market, under this Act, cannot be determined by mere verbality as a matter of law.

2. The structure and purpose of the Act show that the application of the term "reasonable stockyard services" is dependent on the relevant factual circumstances

If one goes beyond the plain terms in the statute, the structure and purpose of the Act confirm what the text expressly provides. If the stockyard services, referred to in the Act, were self-defining terms,

so as to be rigidly applied as a matter of law, it would have been unnecessary to provide in the statute for the issuance of regulations by stockyard owners and market agencies with respect to the furnishing of those services in a particular market. The Act imposes, however, the "duty" on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory *regulations and practices* in respect to the furnishing of stockyard services * * *" (emphasis supplied). 7 U. S. C. 1952 ed. § 208. The duty imposed by the Act applies to "practices" as well as to "regulations." *Ibid.* Only "reasonable stockyard services" must be furnished by a stockyard owner (7 U. S. C. 1952 ed. § 205), and the owner is charged with the statutory duty of observing and enforcing reasonable practices and of issuing, observing, and enforcing reasonable regulations (7 U. S. C. 1952 ed. § 208).

In imposing the duty on a stockyard owner to issue regulations, the Congress gave recognition to the fact that the owner of a stockyard should be allowed—within the zone of reasonableness—to have supervision over the services and facilities in the owner's business. The Secretary of Agriculture is given substantially the same jurisdiction over stockyard rates and regulations which the Interstate Commerce Commission has over railroads (H. Rept. No. 77, 67th Cong., 1st sess., p. 10; *Tagg Bros.* v. *United States*, 280 U. S. 420, 435, fn. 3), and a railroad retains its "primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of

just for unjust charges" (*Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 92). The Secretary is authorized to prescribe regulations which must be observed if the Secretary decides "after full hearing" that "any rate * * * regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory * * *" (Emphasis supplied). 7 U. S. C, 1952 ed. § 211. It cannot be gainsaid that the avowed purpose of Congress, in the enactment of this measure in 1921, was to provide for a stockyard owner to prescribe regulations, as to the services and facilities in the owner's stockyard, if the regulations thus prescribed are, in view of the facts, within the area or zone of reasonableness. "Subject to reasonable regulation, the right to control and conduct the business of a stockyards company remains in the company just as it did before the enactment of the [Packers and Stockyards] Act." *Houfburg* v. *Kansas City Stock Yards Co. of Maine*, 283 S. W. 2d 539, 544 (Mo.).

The broad scope of the regulations by a stockyard owner or market agency is underscored by the reference in § 310 of the Act to regulations which are "for or in connection with" the furnishing of reasonable stockyard services. 7 U. S. C. 1952 ed. § 211. If, after full hearing, the Secretary "is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, *for or in connection with the furnishing of stockyard services*, is or will be unjust, unreasonable, or discriminatory" [em-

phasis supplied], the Secretary may issue a cease and desist order and also prescribe what rate, charge, regulation, or practice will be just, reasonable, and nondiscriminatory. *Ibid.* The business practices that are "in connection with" the furnishing of the services or facilities at the stockyards are not further described or identified in the Act and are, necessarily, to be determined in view of their relevance and significance in the current of livestock marketing.[11]

[11] Section 310 of the Act refers to rates or charges—as well as regulations—prescribed by a stockyard owner or market agency, and in establishing reasonable rates consideration has been given to such business practices as "appraisal work," *viz.*, the practice of a market agency in sending, on request, a salesman to appraise the livestock on a patron's ranch or farm. *In re Market Agencies at Sioux City Stockyards*, 9 Agr. Dec. 4, 38–40. In some market situations, it is believed that "the market as a whole receives a direct benefit from this appraisal service in that it brings a flow of livestock to the market, thus providing a variety of livestock to fill the demands of order and packer buyers, and that, in turn, this attracts packer and order buyers to the market and increases the usefulness of the market as whole for all the patrons." *Id.* at 39. "The rules of the Sioux City Livestock Exchange classify appraisal trips as business soliciting trips and limit the number of trips which its members may make in the course of a month." *Id.* at 86. "The fact that the number of appraisal trips is limited by the rules of the Exchange indicates that its members believe that there is danger it will be overdone" in view of the fact that the rate of commission is fixed, under the Act, and an undue amount of appraisal work would unduly increase expenses. *Id.* at 87. Although the amount expended in getting and maintaining business is a matter of managerial judgment, nonetheless a rate, in order to be reasonable, should not be made to compensate for extravagant expenditures. *Acker* v. *United States*, 298 U. S. 426, 430–431; *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 475–476.

3. *The long established administrative practice under the Act supports the view that the relevant facts—in the business areas involved—must be considered and evaluated in order to determine whether the regulations in this case are "unreasonable" so as to be violative of the statutory provisons*

Many regulations—which have been made effective since the Packers and Stockyards Act became effective in 1921—reveal the efforts by the industry and by the Secretary to apply the statutory terms to the factual complexities in this great current of business. Here, as in *Armour & Co.* v. *United States,* 312 U. S. 195, 197, the significance or reasonableness of the regulations must be evaluated in view of extensive facts in a specialized field. The respondent's contention (R. 5, 72) that the reasonableness of the regulations must be arrived at *in vacuo,* as a matter of law, is conflictive with the wide range of the administrative practice in the governance of livestock marketing at the posted stockyards. The following selections from various regulations illustrate, we believe, the relevant meaning that has been given, in practice over a long period of time, to the terms of the Act. The regulations adopted plainly show that the reasonableness of the regulations must turn on the facts.

The regulations at the Denver terminal stockyard in 1924 prohibited "dishonorable or uncommercial" conduct or "any practices * * * detrimental to the welfare of the market * * *." *Regulations of the Denver Live Stock Exchange* (revised 1924), p. 22,

rule 8, § 2.[12] The regulations also provided that "[a]ny member of this Exchange who shall solicit a shipment of stock already consigned to another member, either in transit or after its arrival at the yards, or who shall, by false representation in regard to the standing or character of any other member, attempt to secure the sale of any consignment," shall be deemed to be a violator of the rules of the Exchange, although a person is free to "solicit business in a fair and honorable way." *Id.* at p. 30, rule 13, § 5. The rule with respect to hog dockage specified the types of hogs and the number of pounds to be allowed for shrinkage or dockage on hogs of each group. *Id.* at p. 31, rule 13, § 3. Market agencies were prohibited by the 1924 regulations of the Exchange from acting in a "dual capacity of buyer and seller on any shipment of livestock consigned to them." *Id.* at p. 42, rule 27.

The regulations at the Chicago terminal market in 1924 provided that "[a]ny member of this Exchange who shall solicit a shipment of livestock consigned to another member, either in transit or after its arrival at the yards, or who shall, by misrepresentation in regard to the character or standing, or by the dissemination of any false report regarding any mem-

[12] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C. A livestock exchange, the members of which are "in the live stock commission business" at a particular market, is regarded as a market agency with respect to the issuance of regulations. 34 *Op. Atty. Gen.* 267, 268, 274.

ber, attempt to secure the sale of any consignment of livestock, shall be deemed guilty of uncommercial conduct" and in violation of the regulations. *Regulations of the Chicago Live Stock Exchange* (filed February 14, 1924), p. 23, rule XI, § 1.[13] Also, a "member engaged in the Chicago livestock trade and resident at Chicago may solicit business west of the Missouri River not exceeding thirty consecutive days, and not to exceed sixty-three days in any one calendar year." *Id.* at p. 20, rule X, § 2.[14]

The regulations at the Indianapolis terminal market in 1923 provided that "[n]o member of this Exchange shall pay a commission, or allow any rebate whatever, to any person acting as agent * * * of any buyer of livestock on this market, and any representation that such person acted as agent of the seller, rather than the buyer, shall be considered a violation of this section * * *." *Regulations of the Indianapolis Live Stock Exchange* (filed 1923), p. 46, rule IX, § 4.[15] "No member of this Exchange shall try to take a buyer from another member while said buyer is in member's pen or going to [the] pen with said member. Nor shall any member stand outside [the] stock pen while another

[13] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[14] Reasonable rates cannot be made to compensate for unreasonable expenditures in so-called business getting. *Acker* v. *United States*, 298 U. S. 426, 430–431; *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 475–476; *In re Market Agencies at Sioux City Stockyards*, 9 Agr. Dec. 4, 38–40, 86–87.

[15] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

member is trying to sell stock, or in any way interfere with said member while trading." *Id.* at p. 46, rule IX, § 5.

The owners of stockyards have, from time to time, issued regulations to prohibit methods of doing business which, in view of the facts, militate against the stability or integrity of the market. The regulations in the St. Joseph terminal market in 1923 provided that "[a]ny firm, corporation, or individual by themselves or their employees, detected using unfair, dishonest, or fraudulent practices, will be denied the privileges of these stockyards * * *." *Regulations of the St. Joseph Stock Yard Company* (filed 1923), p. 4, rule 3.[16] A similar rule was included in the regulations at other stockyards. See, *e. g.*, the regulations of the *Union Stock Yards Company of Omaha* (filed 1923), p. 4, rule 3; the *Sioux City Stock Yards Company* (effective 1928), p. 4, rule 3; the *Belt Railroad & Stock Yards Co.*, Indianapolis, Indiana (filed 1922), p. 5, rule 17; the *Fort Worth Stock Yards Company* (effective September 10, 1926), p. 6, § 9, rule 8; the *Denver Union Stock Yard Company* (effective 1923), p. 2, rule 3; and the *St. Louis National Stock Yards* (Supp. No. 9 to Tariff No. 1 effective January 5, 1924), No. 15.[17]

Numerous regulations have been issued by stockyard owners with respect to the solicitation of business by market agencies or dealers. *E. g.*, the regula-

[16] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[17] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

tions of the *Denver Union Stock Yard Company* (effective June 1, 1938), provided that "[n]o market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming truck, wagon, or drive-in stock from the streets adjacent to or upon the property of this company prior to delivery into holding pens. * * * No person, without the express permission of this Company in writing, shall solicit any business in these yards for other markets, sales at outside feed yards or country points, or endeavor to secure customers to sell or purchase livestock elsewhere."[18] Similarly, the owner of the Kansas City stockyards made regulations effective, approximately 20 years ago, to prohibit a market agency or other person at that stockyard from soliciting business for other markets or endeavoring "to secure customers to sell or purchase livestock elsewhere."[19]

Various terminal stockyards have regulations which are similar to the contested rules of the Denver Union

[18] *Regulations of the Denver Union Stock Yard Company* (effective June 1, 1938), p. 4, § 11, rules 10 and 11. These regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[19] *Regulations of the Kansas City Stock Yards Co.*, Tariff No. 7, § XII, rule 8, and subsequent tariffs to and including Tariff No. 12, rules 9 and 10. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

Stock Yard Company.[20] Many terminal stockyards have regulations in effect to prohibit market agencies and dealers from engaging in various business activities in certain areas of the stockyards or in certain areas adjacent to the stockyards.[21] It is provided in

[20] See, Kansas City Stock Yards Co., Tariff 12, rules 9 and 10; Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Supplement 13, rule 14; Los Angeles Union Stockyards Co., Tariff 16, item 10 (c); Union Stock Yards, San Antonio, Texas, Tariff 13, item 10 (c); The Ogden Union Stockyards Co., Tariff 12, rule 11; Union Stock Yards Co. of Montgomery, Tariff 11, rule 9; Jonesboro Stockyards, Inc., Jonesboro, Arkansas, Tariff 2, Supplement 7, rule 9; Stockton Union Stockyards, Stockton, California, Tariff 6, rules 1 (A), 1 (C) (3), 1 (C) (6), 1 (C) (7); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rules 13 and 14. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture. An adjudicatory proceeding is pending in the Department with respect to the validity of the regulations in the Los Angeles market. *Producers Livestock Marketing Association* v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188. It is provided in the regulations applicable to market agencies and dealers at the Los Angeles market, *inter alia*, as follows: "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase live tock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." Los Angeles Union Stockyards Co., Tariff 16, item 10 (c).

[21] See, Union Stock Yards, San Antonio, Texas, Tariff 13, item 10 (a) and (b); St. Paul Union Stockyards Co., Tariff 26, rule 8; Union Stock Yards Co. of Omaha, Tariff 17, rule 4; Kansas City Stock Yards Co., Tariff 12, rule 14; The Den-

the regulations in effect in 42 terminal stockyards that "stockyard services" will be furnished only to a "rea-

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ver Union Stock Yard Co., Tariff 14, item 10 (a); Ft. Worth Stockyards, Tariff 7, rule 9; Los Angeles Union Stockyards Co., Tariff 16, item 10 (a) and (b); The Sioux City Stock Yards Co., Tariff 15, rule 8; The Wichita Union Stock Yards Co., Tariff 13, § VI (C); St. Joseph Stock Yards Co., Tariff 20, item 11 (1); Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, rule 6; Billings Public Stockyards, Billings, Montana, Tariff 5, rule 8; Brighton Stock Yards Co., Brighton, Mass., Tariff 2, rule 4; The Buffalo Stock Yards, tariff 11, rule 4; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rule 9; The Cleveland Union Stock Yards Co., Tariff 8, rule 9; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, rule 6; The Detroit Stock Yards, Tariff 12, rule 4; The Evansville Union Stock Yards Co., Tariff 10, rule 12; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, rule 9; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rule 8; Port City Stockyards Co., Houston, Texas, Tariff 4, rule 7; The Belt Rail Road and Stock Yards Co., Indianapolis, Indiana, Tariff 8, rule 10; The Joplin Stockyards, Inc., Joplin, Missouri, Tariff 3, § 9 (C) and (J); Greater Little Rock Stockyards, Tariff 1, item 7; South Memphis Stock Yards Co., Tariff 11, § 13 (7); Milwaukee Stockyards, Tariff 3, rule 8; Union Stock Yards Co. of Montgomery, Tariff 11, rule 3 (c); The Ogden Union Stockyards Co., Tariff 12, rule 10; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, rule 4; The Peoria Union Stock Yards Co., Tariff 11, item 3; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (4); Portland Union Stock Yards Co., Tariff 19, rule 9; Richmond Union Stock Yards Co., Tariff 9, rule 9; Mississippi Valley Stockyards, St. Louis, Missouri, Tariff 8, rule 4; Salt Lake Union Yards, Tariff 8, rule 8; South San Francisco Union Stockyards, Tariff 8, rule 9; Sioux Falls Stock Yards Co., Tariff 11, rule 8; Old Union Stockyards Co., Spokane, Washington, Tariff 9, rule 11; The Union Stock Yards Co., Springfield, Missouri, Tariff 3, item 13; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 8; Tulsa Stockyards, Inc., Tariff 4, item 6 (1); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 4. These regulations are in public docu-

sonable number" of market agencies and dealers, and the stockyard companies reserve the right to refuse to furnish any service to market agencies and dealers in excess of the number considered by the stockyard companies to be reasonable. [22] It is the general prac-

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ments on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

[22] See, Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, rule 2; Billings Public Stockyards, Billings, Montana, Tariff 5, rule 15 (B); The Buffalo Stock Yards, Tariff 11, rule 3; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rule 13; The Cincinnati Union Stock Yard Co., Tariff 12, rule 9; The Cleveland Union Stock Yards Co., Tariff 8, rule 2 (b); The Union Stock Yards Co., Dayton, Ohio, Tariff 6, Rule 9; The Detroit Stock Yards, Tariff 13, rule 3; The Evansville Union Stock Yards Co., Tariff 10, rule 2; Union Stockyards Co. of Fargo, West Fargo, N. D., Tariff 7, rule 1 (B); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rule 10; Fort Worth Stockyards, Tariff 7, rule 2; Port City Stock Yards Co., Inc., Houston, Texas, Tariff 4, rule 4; The Belt Rail Road and Stock Yards Co., Indianapolis, Ind., Tariff 8, rule 2; Jonesboro Stockyards, Inc., Jonesboro, Ark., Tariff 2, rule 4; The Joplin Stockyards, Inc., Joplin, Mo., Tariff 3, § 9 (G); Greater Little Rock Stockyards, Tariff 1, item 11; Los Angeles Union Stockyards Co., Tariff 16, item 4; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, rule 2; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7, § 6; South Memphis Stock Yards Co., Tariff 11, § 6; Milwaukee Stockyards, Tariff 3, rule 10; Union Stock Yards Co. of Montgomery, Tariff 11, rule 2; Oklahoma National Stock Yards Co., Tariff 12, rule 9; Parsons Stockyards Operating Co., Parsons, Kan., Tariff 2, rule 6; The Peoria Union Stockyards Co. Inc., Tariff 11, item 13; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (2); Portland Union Stock Yards Co., Tariff 19, rule 15; Richmond Union Stock Yards Co., Tariff 9, rule 2; Union Stock Yards, San Antonio, Tariff 13, item 1; South San Francisco Union Stockyards, Tariff 8, rule 14; The Sioux City Stockyards Co., Tariff 15, rule 13; Sioux Falls Stock Yards Co., Tariff 11, rule 13; Old Union Stockyards Co., Spokane, Wash., Tariff 9, rule 2; The Union

tice of the stockyard companies to promulgate rules whereby stockyard services are denied to any market agency or dealer who engages in unfair, dishonest, or fraudulent practices, or who destroys stockyard property or who engages in other proscribed activities.[23]

Stock Yards Co., Springfield, Mo., Tariff 3, item 10; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 1 (B); Tulsa Stockyards, Inc., Tariff 4, item 6 (8); The Wichita Union Stock Yards Co., Tariff 13, § VI (G); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 9; St. Paul Union Stockyards Co., Tariff 26, rule 15; Kansas City Stock Yards Co., Tariff 12, rule 6; The Denver Union Stock Yard Co., Tariff 14, item 4. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

[23] See, Union Stock Yard Co. of Baltimore County, Tariff 11, rules 11 and 12; Billings Public Stockyards, Billings, Montana, Tariff 5, rules 9 and 15 (F); Brighton Stock Yards Co., Brighton, Mass., Tariff 2, rule 3; The Buffalo Stock Yards, Tariff 11, rule 13; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rules 10 and 11; The Union Stock Yard and Transit Co. of Chicago, Tariff 17, § 11; The Cincinnati Union Stock Yard Co., Tariff 12, rule 13; The Cleveland Union Stock Yards Co., Tariff 8, rule 14; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, rule 11; The Detroit Stock Yards, Tariff 12, rule 12; The Evansville Union Stock Yards Co., Tariff 10, rule 8; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, rule 10; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rules 1, 2 and 21; Fort Wayne Union Stock Yards Co., Tariff 6, rule 4; Fort Worth Stockyards, Tariff 7, rules 6, 8, and 13; Port City Stock Yards Co., Houston, Texas, Tariff 4, rules 10 and 12; The Jersey City Stock Yards, Inc., Tariff 2, § IX; Jonesboro Stockyards, Inc., Jonesboro, Ark., Tariff 2, rules 1 and 6; The Joplin Stockyards Inc., Joplin, Mo., Tariff 3, §§ 9 (D), 9 (E), and 9 (I); Union Stock Yard Co. of Lancaster, Tariff 10, p. 3; Greater Little Rock Stockyards, Tariff 1, items 8

Footnote 23—continued.

and 9; Los Angeles Union Stockyards Co., Tariff 16, item 1; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, rule 9; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7, § 12 (3); South Memphis Stock Yards Co., Tariff 11, § 13 (4); Milwaukee Stockyards, Tariff 3, rule 9; Union Stock Yards Co. of Montgomery, Tariff 11, rule 14; Farmers National Stock Yard Co., Muncie, Ind., Tariff 2, rule 7; Nashville Union Stock Yards, Inc., Tariff 9, rules 5 and 6; St. Louis National Stockyards Co., Tariff 9, § XV; Union Stock Yard & Market Co., New York, New York, Tariff 7, item 7 (1); The Ogden Union Stockyards Co., Tariff 12, rule 17; Oklahoma National Stock Yards Co., Tariff 12, rule 11; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, rules 9, 10, and 11; The Peoria Union Stock Yards Co., Tariff 11, item 1; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (8) and (9); Portland Union Stock Yards Co., Tariff 19, rules 10 and 14; Richmond Union Stock Yards Co., Tariff 9, rule 13; St. Joseph Stock Yards Co., Tariff 20, item 11 (3) and (4); Mississippi Valley Stockyards, St. Louis, Mo., Tariff 8, rule 1; Salt Lake Union Stock Yards, Tariff 8, rule 5; Union Stock Yards, San Antonio, Tariff 13, item 2; South San Francisco Union Stockyards, Tariff 8, rule 10; Seattle Union Stockyards Co., Tariff 1, item 11; The Sioux City Stock Yards Co., Tariff 15, rule 9; Sioux Falls Stockyards Co., Tariff 11, rule 9; Old Union Stockyards Co., Spokane, Washington, Tariff 9, rule 10; Springfield Stock Yards Co., Springfield, Ill., Tariff 2, rules 4 and 7; The Union Stock Yards Co., Springfield, Mo., Tariff 3, item 12; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 9; Texarkana Stockyards, Inc., Texarkana, Texas, Tariff 3, item 7 (1), (2), and (8); Tulsa Stockyards, Inc., Tariff 4, item 6 (2) and (5); The Wichita Union Stock Yards Co., Tariff 13, § VI (D) and (E); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 11; St. Paul Union Stockyards Co., Tariff 26, rule 9; Union Stock Yards Company of Omaha, Tariff 17, rule 3; Kansas City Stock Yards Co., Tariff 12, rules 1 and 2; The Denver Union Stock Yard Co., Tariff 14, item 1. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

The regulations issued by the Secretary [24] also manifest the administrative practice of interpreting the terms of the Act on the basis of the factual circumstances in each market. See, *e. g.*, 9 CFR, 1956 Supp., § 201.79 (b); 9 CFR (1st ed., 1939), §§ 201.16 and 201.17, and 1956 Supp., §§ 201.71–201.85. The assignment of pens and facilities by a stockyard owner, an important stockyard service, "shall be made, reviewed annually or oftener, if conditions warrant, and adjusted or changed, in number or location, on the basis of the availability of pens and facilities, the need of the registrant for such assignment, volume and kind of livestock handled, the number, size, character, and kind of consignments received or lots purchased, the seniority of the market agency or dealer, the operating conditions of the stockyard, and other pertinent considerations * * *." 9 CFR, 1956 Supp., § 201.79 (b).[25] Plainly, this is a recognition of the fact that

[24] The regulations by the Secretary were issued pursuant to 7 U. S. C. 1952 ed., § 228.

[25] A stockyard owner shall not, however, "discriminate *unfairly* with respect to the utilization of pens, alleys, or buildings, for the yarding or handling of livestock * * *." [Emphasis supplied.] 9 CFR (1st ed. 1939), § 201.16 and 1956 Supp., § 201.79 (a). A stockyard owner should "exercise reasonable care and promptness in respect to yarding, feeding, watering, weighing, and otherwise handling livestock to prevent waste of feed, shrinkage, injury, death, or other unavoidable loss." 9 CFR (1st ed. 1939), § 201.17, and 1956 Supp. § 201.82. The regulations by the Secretary "shall not prevent the legitimate application or enforcement of any valid bylaw, rule or regulation, or requirement of any exchange, association, or other organization, or any other valid law, rule, or regulation, or requirement to which any packer, stockyard owner, market agency, dealer, or licensee shall be subject which is not inconsistent or in conflict with the act and the regulations in this part." 9 CFR, 1956 Supp., § 201.4 (a).

the livestock industry, far from uniform in character, is a huge and complex affair and that uniformity of regulation cannot be applied amid the diversities of the market place; that in order for the terms of the Act to have practicality, the regulations under the statute must be written in view of the differences in market structures, the differences in trade practices, the differences in the degree of technology, and the differences in a variety of respects, market by market. The adjudicatory decisions by the Judicial Officer also reveal that the statutory terms are general standards to be applied not in an artificial way but to the different and changing situations in a great industry in operation. See, *e. g., Gilbert R. Smith* v. *Union Stockyards Co.*, 9 Agr. Dec. 588, 597; *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 23–27; *Farmers Union Livestock Ass'n* v. *St. Paul Union Stockyards*, 12 Agr. Dec. 1026, 1032–1033; *Dougherty* v. *Union Stock Yard & Transit Co.*, 13 Agr. Dec. 239, 245.

This administrative practice is of wide import. It is the Department's purpose to maintain "the integrity of the public markets," and market agencies or dealers who do not conform to a "high code of ethics" are not entitled to transact business at the public stockyards. *Flynn* v. *Kansas City Stockyards Co.*, 12 Agr. Dec. 14, 20–21. A stockyard owner and the patrons of the market are seriously injured if a dealer or market agency is guilty of dishonest practices in the marketing of livestock. *Id.* at 22. See, also, *In re Producers Livestock Mktg. Assn.*, 14 Agr. Dec. 109, 110–120. Absolute integrity on the part of

a market agency or dealer is essential in the operation of public stockyards.[26] Market agencies or dealers who have been guilty of dishonest practices are not entitled, as a matter of right, to receive stockyard services. See *e. g., Cella* v. *United States,* 208 F. 2d 783, 785–790 (C. A. 7), certiorari denied, 347 U. S. 1016; *Kelly* v. *Union Stockyards & Transit Co. of Chicago,* 190 F. 2d 860, 861–864 (C. A. 7). "Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business." *Gilbert R. Smith* v. *Union Stockyards Co.,* 9 Agr. Dec. 588, 597.

The broad and long-established practice, in the Department and in the industry, in the interpretation of the Act is also reflected in various cases. An example of the discretion vested in a stockyard owner with respect to the furnishing of stockyard services is found in *Farmers Union Livestock Ass'n* v. *St. Paul Union S. Co.,* 97 F. Supp. 539, 540 (D. Mont.), in which it was held that the allocation of stockyard pens, at a posted stockyard, on the basis of the amount of business done by commission firms to whom the pens are assigned is not unreasonably discriminatory so as to impinge on the duty of the stockyard

[26] "[T]he success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly." *Midwest Farmers* v. *United States,* 64 F. Supp. 91, 95 (3-Judge Court, D. Minn.).

owner to furnish reasonable stockyard services on reasonable request. Another similar decision under the Act is *DeVries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C. A. 8), certiorari denied, 344 U. S. 934. Also a stockyard owner may protect its lawful interests by refusing to furnish any stockyard service to dishonest dealers or dishonest traders. *Carnes* v. *St. Paul Union Stockyards Co.*, 175 Minn. 294, 221 N. W. 20, 21. See, also, *Birmingham* v. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39, 43, certiorari denied, 332 U. S. 768. It was held in *Kelly* v. *Union Stockyard & Transit Co. of Chicago*, 190 F. 2d 860, 864 (C. A. 7), that issues as to alleged unreasonable discrimination by a stockyard owner, in the furnishing of stockyard services, are "primarily factual rather than legal," and present "questions in which 'the enquiry is essentially one of fact and discretion' * * *." See, also, *Fort Worth Stockyards Co.* v. *Brown* (Tex. C. C. A.), 161 S. W. 2d 549, 553–554.

The administrative practice in the interpretation of the statute is, we submit, entitled to great weight, and should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396; *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199; *Fleming* v. *Mohawk*, 331 U. S. 111, 116; *Boutell* v. *Walling*, 327 U. S. 463, 470–471; *United States* v. *American Trucking Ass'n*, 310 U. S. 534, 549. It has been familiar doctrine since *Edwards* v. *Darby*, 12 Wheat. 206, 210, that "the contemporaneous construction of those who were called upon to act under the law, and were

appointed to carry its provisions into effect, is entitled to very great respect." Moreover, in the present case the administrative construction is, we submit, plainly right.

C. The Court of Appeals Erred in Holding that the Regulations Are, on Their Face, Illegal as a Matter of Law Under the Packers and Stockyards Act

The regulations were nullified by the Court of Appeals on a record that (1) is void of an administrative finding that the regulations are unreasonable and (2) is barren of evidence to show that the regulations are unreasonable.

The respondent in this Court, *i. e.*, the complainant in the administrative proceeding, filed an "Election to Rest" stating that in the administrative proceeding it "will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law" (R. 72). The respondent in this Court elected, as the complainant in the administrative proceeding, to stake its case on the proposition that the regulations are invalid, on their face, as a matter of law and that all evidence is, therefore immaterial in the proceeding (R. 72). The only question, therefore, before the Judicial Officer in the Department of Agriculture was whether the regulations are, on their face, illegal as a matter of law, and being unable to conclude that the regulations considered *in vacuo* are, as a matter of law, illegal, the Judicial Officer dismissed the complaint (R. 16, 33). Specifically, the Judicial Officer did not decide the question which the respondent in this Court could have presented during the administrative hearing—

but which was not presented—*i. e.*, as to whether the regulations are, in view of the facts, unreasonable and, therefore, invalid.[27]

The Court of Appeals resolved the issues in the case by assuming a factual situation which is not in the case. The Court of Appeals held:

> The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business. If by rendering a reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another (R. 82).

The decisiveness of that holding by the Court of Appeals is revealed by its explanation that "[a]lthough it may be argued that attempts, successful or

[27] The Judicial Officer had no statutory authority in the adjudicatory proceeding to compel the respondent in this Court, *i. e.*, the complainant in the administrative proceeding, to rely on an additional issue—an issue which was antithetical to its position that its books and records should not be made available to the Stock Yard Company for the purpose of presenting evidence at a hearing on the complaint (R. 54–56). The burden of proof, in the administrative proceeding, was on the complainant in that proceeding. 5 U. S. C. 1952 ed., § 1006; *Louisville & Nash. R. R.* v. *United States*, 238 U. S. 1, 11; *Platt* v. *Lecocq*, 158 Fed. 723, 728 (C. A. 8). See, also, *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 602.

otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, *even if proved to be soundly based in fact* [emphasis supplied], has no legal significance" (R. 82).

1. The regulations are not illegal as a matter of law merely because in a certain hypothetical situation, referred to by the Court of Appeals, the regulations would seem to be unreasonable

There is nothing in the record to support the hypothesis on which the Court of Appeals disposed of the case, and the Court's opinion is based only on the supposal set forth in its opinion. No witness testified in the administrative proceeding. No stipulation of facts was filed. No factual allegation was made and admitted with respect to whether a market agency at the Denver market is also a registrant at another competing posted stockyard or, for that matter, how the regulations would, in practice, affect that situation if it exists. No facts were asserted by the Court of Appeals, but the Court disposed of the case on the basis of dualistic assumptions of fact, *viz.*, (1) that a market agency at Denver is also a registrant at another competitive posted stockyard, and (2) that "by rendering reasonable service for a Colorado customer at one stockyard" it is "prohibited from rendering reasonable service for the same or a different Colorado customer at another stock-

yard" (R. 82). No basis exists for either of the Court's assumptions. The second of the two assumptions by the Court consists of two conclusions which, obviously, would have their foundation in further assumptions. It, necessarily, requires an inquiry into the facts to determine whether—in the Court's *suppositum*—the hypothetical market agency was "rendering a *reasonable* [emphasis supplied] service for a Colorado customer at one stockyard" in the situation which was undisclosed in the Court's assumption of facts (R. 82). It also requires an inquiry into the facts to determine whether the hypothetical market agency would be "prohibited," by the regulation, "from rendering *reasonable* service for the *same or a different* [emphasis supplied] Colorado customer at another stockyard" in whatever the situation is to which the Court alludes (R. 82). It cannot be determined *ex hypothesi* whether the respondent market agency is a registrant at competitive posted stockyards,[28] and there is nothing in the record to admeasure the impact of the regulations. The frailties of the hypothesis are visible, but it is sufficient that there is nothing in the record to support the hypothesis or any part of it.

The holding by the Court of Appeals is squarely in conflict with *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, in which it was held that courts in

[28] A justiciable controversy is not presented by the hypothetical case on which the Court of Appeals disposed of the case. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241; *Sprunt & Son* v. *United States*, 281 U. S. 249, 255–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148; *Mills* v. *Green*, 159 U. S. 651, 653.

passing on the validity of a regulation, under an Act of Congress, are to dispose of the case "upon the basis of the facts disclosed," never on the basis of "non-existent and assumed circumstances." It was argued in the *Associated Press* case, *supra,* that the regulation would be illegal in a certain hypothetical situation but that argument was disposed of by the Court's statement that "[n]o such question is here for decision. * * * [The appellant] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances." It is not the function of the courts to give opinions upon abstract propositions (*Mills* v. *Green,* 159 U. S. 651, 653), and a justiciable controversy is "distinguished from a difference or dispute of a hypothetical or abstract character" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240). See, also, *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419, 431.

The principle which was applied in *Associated Press* v. *Labor Board, supra,* 301 U. S. at 132, is particularly forceful with respect to statutory terms of generality and adaptability, such as those in the case at bar. The Packers and Stockyards Act was designed to have meaning and significance in the practical affairs of the Nation's livestock industry, *e. g.,* to abate the market practices which are not within the statutory criteria and to require practices which, in view of the needs of the market, are conducive to

the effectuation of the legislative goal.[29] Plainly it was not the purpose of Congress to require that regulations in order to be valid must be reasonable as applied to all abstract, imaginary, or hypothetical situations. To interpolate into the statutory provision a requirement that the regulations must be

[29] The Court of Appeals by its imaginant method of deciding the case necessarily ignored the principle that presumptive weight should be given to an administrative agency's decision concerning the relevance of facts to be taken into account and the weight to be given to those facts. See, *e. g.*, *United States* v. *Jones*, 336 U. S. 641, 664; *Interstate Commerce Comm.* v. *Parker*, 326 U. S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303–304; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. The broad terms of the statute are for application by the administrative agency, in the exercise of its discretion, to an infinite variety of circumstances which may occur in specific instances. *Ibid.* Here, as in *Far East Conf.* v. *United States*, 342 U. S. 570, 574–575, the administrative agency "should not be passed over" in the resolution of an issue as to the reasonableness of the regulations. The case of *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S. W. 1015 is manifestly inapposite. In the *Grissim* case, the stockyard owner sought an injunction against an employee of a commission firm, J. D. Bolling & Co., but the Court said that, under the pleadings "no complaint is made by complainant against J. D. Bolling & Co., notwithstanding that it indisputably appears that defendant, in doing such acts as he is doing upon complainant's premises, is acting as the agent of J. D. Bolling & Co., and in their behalf; that the bill [of complaint] does not allege any specific acts of misconduct against the defendant as the agent of J. D. Bolling & Co." 280 S. W. at 1018. A case is, of course, "to be read in the light of the facts of the case" (*Armour & Co.* v. *Wantock*, 323 U. S. 126, 133), and general statements in an opinion which go beyond the case are not controlling (*Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627; *Osaka Shosen Line* v. *United States*, 300 U. S. 98, 102–104).

reasonable as applied to artificial, hypothetical, or assumed situations would so obviously foster the enfeeblement and devitalization of the Act that it cannot be accepted as a proper interpretation of the purpose of Congress. A regulatory statute should be interpreted so that its effectiveness will not be impaired, and, if possible, an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 392. See, also, *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 330.

2. The regulations are not as a matter of law unreasonable in their entirety merely because—as held by the Court of Appeals—in a certain hypothetical situation a part of the regulations would be unreasonable

The regulations apply to dealers as well as to market agencies (R. 12, 39). The statutory provision, however, relied on by the Court of Appeals relates to market agencies but not to dealers (R. 82). The Court of Appeals concluded that the regulations are "in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business" (R. 82). But nothing is said in that statutory provision about a duty on the part of the dealers, and nothing is said about dealers in the opinion by the Court of Appeals. The assumed case on which the Court of Appeals disposed of the case does not relate to a dealer (R. 82), and if it did in-

volve a dealer there would be no impingement upon the statutory provision referred to by the Court of Appeals, *scil.*, 7 U. S. C. 1952 ed. § 205, which imposes a duty on stockyard owners and market agencies but not on dealers.

There is, manifestly, no reason for nullifying the regulations with regard to dealers. Even if the regulations in the hypothetical situation referred to by the Court of Appeals are discriminatory or unreasonable as to market agencies—under the statutory section referred to—there is no ground for the decretorial action of the Court in striking down, *per saltum*, the regulations with respect to dealers also. It was clearly erroneous for the Court, in view of its jurisdiction (5 U. S. C. 1952 ed. § 1039 (a); 7 U. S. C. 1952 ed. § 211), to nullify regulatory provisions which have not been challenged and which are clearly not invalid under the provision in the Act relied on by the Court.

Assuming, *arguendo*, that the regulations are invalid as to market agencies, nonetheless the regulations should not have been declared invalid as to dealers also, and the Court should have remanded the case to the Secretary for further proceedings in accordance with the Act and the Court's opinion. The "function of the reviewing court ends when an error of law is laid bare," and the proceeding should then be remanded to the administrative agency "for reconsideration." *Federal Power Com.* v. *Idaho Power Co.*, 344 U. S. 17, 20. See, also, *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 373–376; *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141–146; *Trade*

Comm'n v. *Morton Salt Co.*, 334 U. S. 37, 55. Here the regulations as to dealers are not subjected to attack in this litigation, and the Court of Appeals plainly erred in ordering the Secretary to issue a cease and desist order as to the regulations *in toto*.

The interdictory action of the Court of Appeals, as to the regulative provisions applicable to dealers, is also conflictive with the authority of the Secretary under the Packers and Stockyards Act. 7 U. S. C. 1952 ed. § 211. If regulatory provisions are, in whole or in part, "unjust, unreasonable, or discriminatory," the Secretary may determine and prescribe what regulations are or will be just, reasonable, and non-discriminatory to be thereafter followed and observed by market agencies or stockyard owners. *Ibid.* The judgment of the Court of Appeals deprives the Secretary of his statutory authority even assuming, *arguendo*, the invalidity of the regulations issued by the stockyard owner. Instead of ordering the Secretary to issue a cease and desist order, with respect to the regulations in their entirety, the Court of Appeals should have remanded the proceeding to the Secretary for further action, within the discretion of the Secretary, relative to the regulatory provisions. The Secretary is "the guardian of the public interest" under this Act. *United States* v. *Morgan*, 313 U. S. 409, 415. See, also, *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535–536.

3. In the total absence of any evidence to show that the regulations are unreasonable, the Court of Appeals erred (a) in holding that the regulations are, as a matter of law, unreasonable, and (b) in requir-

ing the administrative agency to issue a cease and desist order with respect to the regulations. The decision of the Judicial Officer in the Department of Agriculture—that the regulations are not, on their face, illegal as a matter of law—was correct, and should have been affirmed by the Court of Appeals

The issues in the case are within the narrow confines of the record. Here, as in *United States* v. *Automobile Workers*, 352 U. S. 567, 592, the respondent, as the complainant in the administrative proceeding, undertook to shape the litigation so as to secure a comprehensive and rigid ruling as to the meaning of the terms in the Act—and thereby avoid the Stock Yard Company's avowed intention to explore the facts (R. 47–51). The respondent elected, as the complainant in the administrative proceeding, to stake its case on the proposition that all evidence is immaterial and that the regulations are on their face illegal as a matter of law (R. 72). The covert and sometimes difficult issues of fact in this wide area of business complexity, in evaluating the reasonableness of regulations, cannot be overleaped by an election, in an administrative proceeding, to foreclose all evidence, as immaterial, in the application of the broad and supple terms in the statute.

As we have shown, *supra*, pp. 26–52, the terms of the Act do not lend themselves to application with exactitude as a matter of law but constitute a policy to be followed in view of the variant and changeable situations in the many stockyards throughout the country. The application of the statutory provision for "rea-

sonable stockyard services," as we have shown, *supra*, pp. 26–52, turns on the exigencies of a particular situation; the application of the Act is to be made to the facts of a particular case, and not by mechanical application of a fixed rule of law. Reasonable stockyard services are to be furnished in accordance with the needs of the market, from time to time, to the needs emergent in modern war as well as the needs that have their genesis in the dynamic structure of our growing and changing economy.

The statutory provisions are not, in this respect, novelties. It is f miliar doctrine that "few words possess the precision of mathematical symbols," and "most statutes must deal with untold and unforeseen variations in factual situations * * *." *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340. The statutory term "reasonable stockyard services," is, in character, similar to the term "ordinary * * * expenses" which has been characterized as "a variable affected by time and place and circumstance" (*Welch* v. *Helvering*, 290 U. S. 111, 113–114). There is no "verbal formula that will supply a ready touchstone" for deciding what is ordinary (*id.* at 115), and likewise the scope or ambit of the statutory provisions for "reasonable stockyard services" upon "reasonable request" cannot be determined without the consideration and evaluation of the relevant factual circumstances. Here, as in *First National Bank* v. *Beach*, 301 U. S. 435, 438 "[h]ypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that," but, said the Court, "[w]e refuse to

be led away from the limitations of the concrete case. The words 'primarily engaged', as we find them in the first branch of the definition, do not constitute a term of art. * * * In every case the totality of the facts is to be considered and appraised. We pass to that appraisal here." *Id.* at 438–439.

Whether it is the reasonableness of the rates at a stockyard or the reasonableness of regulations at a stockyard, the statutory standard is the same. "Whenever, after full hearing upon a complaint * * * or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative * * *, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable or discriminatory," the Secretary may determine and prescribe what will be the just and reasonable rate or charge and what regulation or practice is or will be just, reasonable, and non-discriminatory, to be thereafter followed. 7 U. S. C. 1952, ed. § 211. The reasonableness of rates under the Packers and Stockyards Act depends on the evidence (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 55, 71; *Acker* v. *United States,* 298 U. S. 426, 430–431, 434; *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 485; *Morgan* v. *United States,* 298 U. S. 468, 480; *United States* v. *Morgan,* 313 U. S. 409, 417), and likewise the reasonableness of regulations, as to stockyard services, depends on the evidence. "'Unreasonable' is not a word of fixed content and whether preferences or advantages are

unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage." *Swift & Co.* v. *Wallace,* 105 F. 2d 848, 854–855 (C. A. 7). Neither reasonable rates for stockyard services nor reasonable regulations for stockyard services are determined or established as a matter of law in the abstract or on the basis of imaginary facts.

The Packers and Stockyards Act vests in the Secretary "substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads" (*Tagg Bros.* v. *United States,* 280 U. S. 420, 435, fn. 3), and in determining whether the required statutory services are being furnished, within the zone of reasonableness, it is necessary for the administrative judgment to be arrived at on the basis of the infinite variety of circumstances which are presented in evidence in a specific case (*Barringer & Co.* v. *United States,* 319 U. S. 1, 6; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, 65; *United States* v. *Detroit Navigation Co.,* 326 U. S. 236, 241; *United States* v. *Jones,* 336 U. S. 641, 664). Whether rates are reasonable or involve an unjust discrimination "is a question of fact for the Commission's determination" (*Barringer & Co.* v. *United States,* 319 U. S. 1, 6), and whether regulations are reasonable is a question of fact for the administrative agency to determine on the basis of the relevant evidence at the hearing. A hearing refers of course to a proceeding "in which evidence is received and weighed by the trier of the facts." *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177,

182. And a "finding without evidence is arbitrary and baseless," *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 91. The regulations could be set aside only on the basis of evidence that they are unjust or unreasonable. *Baltimore & O. R. R.* v. *United States*, 277 U. S. 291, 300.

The principles here, of course, are of general and wide application, and are not confined to the Packers and Stockyards Act and the Interstate Commerce Act. It has been held that "[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint." *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246, 251. "Questions of reasonableness are necessarily questions of relation and degree," and "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *United States*, 297 U. S. 553, 600. "Unreasonableness is not made out by mere assertion" (*Swift & Co.* v. *United States*, 343 U. S. 373, 383), and *a fortiori* unreasonableness is not established by mere speculation or surmise based on a record that is barren of evidentiary facts.

The respondent contended in the administrative proceeding and in the Court of Appeals that the regulations are illegal on their face as a matter of law (R. 5, 56, 72), but the Court of Appeals failed to apply the terms of the Act as a matter of law. The Court fell back on hypothesis, and without any record on which to determine whether the assumed circumstances are correct the Court decided the case. As we have shown, *supra*, pp. 54–58, the statutory terms are not to be applied to supposed facts, but to actual situations. Whether the contested regula-

tions, in their application at the Denver stockyards, are reasonable is a matter that can be determined only on the basis of evidence. The Judicial Officer carefully refrained from expressing an opinion as to whether the regulations are valid or invalid, but decided only that the regulations are not, on their face, invalid (R. 28, 32). The Judicial Officer's decision was, we submit, correct, and we are not expressing in this brief any view as to whether the regulations should be held valid if all of the factual circumstances are presented. But in support of our argument that the reasonableness of the regulations should be determined only on the basis of the market conditions and circumstances, it is appropriate, we believe, to refer in broad outline to some of the circumstances in the livestock industry which, it seems, might be involved in some of the relevant considerations in resolving a factual issue as to reasonableness of the regulations in this case.

The owner of a stockyard is, of course, interested in maintaining the stability and integrity of the market (compare *Kelly* v. *Union Stockyards & Transit Company of Chicago,* 190 F. 2d 860, 861–862 (C. A. 7) with *Cella* v. *United States,* 208 F. 2d 783, 785–788 (C. A. 7), certiorari denied, 347 U. S. 1016), and the interest of the owner in the operations of the stockyard would seem to be broader and somewhat different from the interests of a market agency which has no ownership interest in the stockyard but merely occupies a space—free of rental—in the stockyard and sometimes occupies a space in the office building for which rental is paid (*Tagg Bros.* v. *United*

States, 280 U. S. 420, 437). "In the event, for example, market agencies undertake, in effect, the boycottage of a stockyard, *while they are actively and freely operating on its premises,* by soliciting business for other markets or if they—to the detriment of the stockyard and the patrons of the stockyard—otherwise improperly interfere with the normal flow of livestock to the market, the owner of the stockyard may feel constrained to issue regulations to guard against the practices. It has been said, in the administration of this Act, that one of the responsibilities of the owner of a stockyard is to "[t]ake the leadership in eliminating undesirable trade practices * * *." *Suggestions for Improving Services and Facilities at Public Terminal Stockyards* (United States Department of Agriculture, 1952), pp. 2–3.

The regulations in this case are brief, and apply to market agencies or dealers engaging in business at the posted market in Denver (R. 12, 39). The "area to which this subdivision (c) [*i. e.*, the regulations] shall apply" is carefully circumscribed as the State of Colorado with specified counties or areas therein excepted (R. 12, 39). That delimitation of the "area to which this subdivision (c) shall apply" qualifies and modifies everything in the regulations, and is basic to all of the regulatory provisions. Within the framework of that limited scope of the regulations, the initial provision in the regulations is with respect to the *solicitation* of business for other markets (R. 12, 39). The markets thus referred to are not identified as other stockyards, and there is some indication that the markets are not other stockyards

(R. 64-69). In any event, however, to solicit is to "make petition to; to entreat; importune; * * * now, often, to approach with a request or plea, as in selling * * *." *Webster's New International Dictionary* (2d ed, 1950), p. 2393. The solicitation of business involves entreaty or importunity. *Id.* at 2394. The provisions with respect to the solicitation of business for other markets do not, however, preclude the giving of advice or the carrying on of business activity other than that involving or based on solicitation. Plainly the regulations do not refer or relate to the giving of information or counsel, *i. e.*, advisive activity which is not solicitation. Endeavoring to secure customers to sell or purchase livestock at other markets, as referred to in the regulations (R. 12, 39), is another way of describing the solicitation of business for other markets.

The remaining portion of the regulations relates to the diversion of livestock or an attempt to divert livestock "from this market which would otherwise normally come to this Stockyard" or the interference with "the normal flow of livestock to the public market at this Stockyard" (R. 12, 39). The normal flow of livestock referred to in the regulations is the normal flow of livestock which would come to the posted market in Denver from the defined area, *i. e.*, Colorado with certain counties or areas therein excepted (R. 12, 39).

The regulations impose no restriction on farmers or producers of livestock as to the sale or disposition of their livestock. They are free to dispose of their live-

stock at any market and in any way they choose.[30] The respondent, however, is registered as a market agency at the posted market in Denver, and the respondent, as a market agency, is charged with responsibilities and duties under the Act, the same as a stockyard owner. "The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly." *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (3-Judge Court, D. Minn.).

Improper or otherwise unreasonable trade practices—that is to say, practices which are not consonant with "reasonable stockyard services"—in the buying, selling, or marketing of livestock at a terminal stockyard are of direct concern to the stockyard owner as well as to the patrons of the market. There

[30] Not only are the producers of livestock free to market their livestock as they choose, but in addition the regulations at the Denver market provide that "[a]ny owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without discrimination reasonable facilities and services." Denver Union Stock Yard Co., Tariff 14, item 3 (c). These regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, Washington, D. C.

is the over-riding public interest to be considered, and the factor of direct-marketing is of significance. "It is often said that central markets are basic to price formation. The terminal market prices are certainly of great importance. They represent the values placed on rather large volumes. They are fully reported, and the prices and related information * * * are widely disseminated." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 50. In other significant respects also the continued stability of the terminal stockyards is believed to be in the public interest. See, Waite and Trelogan, *Agricultural Market Prices* (2d ed., 1951), pp. 135, 139, 145. Reasonable regulations for the stability of the market, in the public interest, may be issued. One of the essentials of a terminal stockyard is that "[i]t must accurately value products, including quality differences." Fowler, *The Marketing of Livestock and Meat* (1957 ed.), p. 219. The accurate estimation of value, for example, "is especially important in fat cattle because different lots vary widely in value. To evaluate such difference, adequate numbers of trained and qualified specialists—both buyers and sellers—are needed. Their services can be utilized most economically if concentrated in a few places." *Marketing, 1954 Yearbook of Agriculture*[31] (U. S. Department of Agriculture), p. 49. "To be a good order-buyer market, a large selection of livestock must be available so that such buyers can

[31] The author of this article in the *1954 Yearbook of Agriculture* is Dr. L. J. Norton, Professor of Agricultural Economics, University of Illinois.

find an adequate number of the weight, grade, and class of animals needed to fill specialized orders." *Ibid.* "The advantage of the terminal public market is the experienced salesmanship and the concentration of livestock buyers there." Shepherd, *Marketing Farm Products* (3d ed. 1954), p. 337. "Salesmen of commission firms and the buyers for packers are expert judges of quality. They have information about the current supply of animals of a given species and quality and about general conditions of supply and demand." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 42.[32] "Animals are of such varying quality that their relation to a given quotation is difficult to judge. * * * The skill of the local buyer in judging the quality of the animal is fully as important as his knowledge of the central market quotation in determining the profitability of the transaction to him." Waite and Trelogan, *Agricultural Market Prices* (2d ed., 1951), p. 143.

The stability and integrity of the markets are, manifestly, of public interest. Market agencies—as agents, *i. e.*, commission men for the owners of the livestock—and the different types of buyers at the terminal markets are in a competitive relationship, and "[i]t is the conflict between these sellers and buyers—the one seeking to obtain as much as possible for the livestock and the other seeking to pay as little as possible—that sets the market value of livestock.

[32] The author of this article in the *1954 Yearbook of Agriculture* is Dr. Edward A. Duddy, Professor of Marketing (Emeritus), University of Chicago.

The market value thus set is a yardstick which is used throughout this area", *i. e.*, the geographical area served by the particular terminal market. *In re Market Agencies at Sioux City Stockyards,* 9 Agr. Dec. 4, 22–23. It may be expected that regulations will be issued by stockyard owners with respect to various practices in the solicitation of business and in the consummation of the livestock transactions. As we have shown, *supra,* pp. 38–52, the regulations throughout the industry, over a long period of time, evince a wide variety of provisions. The regulations in the case at bar are not, in this respect, unique. See, *e. g.,* 9 C. F. R. 1956 Supp., § 201.63. In this case and with regard to all similar regulations, broad issues of fact as well as narrow and specific issues of fact are involved in resolving the basic question as to whether, limned against the public interest, the regulations are reasonable in whole or in part.

The regulations relate to trade practices which have not been explained or evaluated. Here, as in *Adams* v. *Mills,* 286 U. S. 397, 409–410, and *Armour & Co.* v. *United States,* 312 U. S. 195, 197, the issues are not pure questions of law, divorced from the facts, but have their setting in the delicate complexities of far-flung business transactions. It is not for the Secretary or for the courts to determine what the terms of the Act may require upon supposable facts, but to adjudge the issues upon existing facts. See, *e. g., Virginian Ry.* v. *United States,* 272 U. S. 658, 665; *Bissell* v. *Spring Valley Township,* 124 U. S. 225, 232. The Act commands a "full hearing" and that has "obvious reference to the tradition of judicial pro-

ceedings in which evidence is received and weighed by the trier of the facts." *Morgan* v. *United States*, 298 U. S. 468, 480. See, also, *United States* v. *Morgan*, 313 U. S. 409, 415, 417.

The evidence has not been received, and in the absence of the evidence it cannot be said that the regulations are unreasonable or discriminatory.

4. On the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, the administrative agency will be free to take whatever action is appropriate with respect to the contested regulations

The Secretary of Agriculture will be free, on the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, to institute an investigation or proceeding, if such is deemed to be appropriate, with respect to whether the regulations are, in view of the facts, unjust or unreasonable. 7 U. S. C. 1952 ed. §§ 210 (c) and 211. The Secretary may on his own motion institute an investigation or a hearing as to the validity of the regulations. 7 U. S. C. 1952 ed § 210 (c). The "Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by a petition * * *." *Ibid.* Investigatory subpoenas may be issued by the Secretary in this administration of the Act (7 U. S. C. 1952 ed. § 222, incorporating 15 U. S. C. 1952 ed. §§ 46 and 48–50), and an investigatory subpoena *duces tecum* issued by the Secretary, in an investigation on his own motion, is judicially en-

forceable under the Packers and Stockyards Act (*Woerth* v. *United States,* 231 F. 2d 822, 823–825 (C. A. 8)).

In this proceeding in the administrative agency, the respondent in this Court was the complainant and the Stock Yard Company was the defendant (*Cf. Henderson* v. *United States,* 339 U. S. 816, 818–823; *United States* v. *Interstate Commerce Com.,* 337 U. S. 426, 428–429, 432–444), but the decision by the Judicial Officer did not pass on whether the regulations are valid, and held only that the regulations are not, as a matter of law, illegal on their face (R. 16, 32). The decision by the Judicial Officer is, on the record before him, *non constat* that the regulations are unreasonable. Hence, there has been no administrative decision which would preclude the Secretary from taking further action—by way of investigation or hearing—on his own motion, or on further complaint by a market agency or dealer, with respect to the validity of the regulations in view of the market circumstances. The Secretary has full authority—on reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, dismissing the complaint—to institute further action if in his discretion it is appropriate, and the administrative duty will be properly discharged.

II. THE BASIC STATUTORY DETERMINANTS WITH RESPECT TO THE VALIDITY OF THE REGULATIONS AT ISSUE ON THIS APPEAL ARE SET FORTH IN THE PACKERS AND STOCKYARDS ACT

This proceeding was instituted under the Packers and Stockyards Act to determine the validity of regu-

lations issued by a stockyard owner pursuant to the Act. The decision by the Court of Appeals relates only to the terms in the Act (R. 77–84). The integrated and inclusive character of the statutory provisions in the Packers and Stockyards Act are manifest from the text and the legislative background. The Act "is a very broad and comprehensive law. * * * [T]hose in charge of the legislation were impressed with its comprehensiveness. In the report of the House Committee on Agriculture [H. Rept. No. 77, 67th Cong., 1st sess., p. 2], it is stated that this law, 'and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith; * * * it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'" *United States* v. *Donahue Bros.*, 59 F. 2d 1019, 1022 (C. A. 8).

The Packers and Stockyards Act was "worked out with great care and painstaking, with a view of providing a constructive measure that would properly safeguard the interest of the public and all elements of the industry from the producer to the consumer without destroying any unit of it." H. Rept. No. 77, 67th Cong., 1st sess., p. 2. "The procedure and language [of the Packers and Stockyards Act] are modeled very closely on the interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over rail-

roads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services." *Id.* at p. 10. The Secretary "is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads * * *." *Tagg Bros.* v. *United States*, 280 U. S. 420, 435, fn. 3. It cannot be gainsaid that the congressional purpose with respect to the stockyard industry, and specifically with respect to the furnishing of reasonable stockyard services by stockyard owners, is set forth fully in the Packers and Stockyards Act. 7 U. S. C. 1952 ed. § 201 *et seq.*

The respondent has referred to the Anti-trust Acts in support of its argument that the regulations are violative of the Packers and Stockyards Act (R. 5, 28), but there is no merit, in view of the record, to the respondent's reference or reliance on those statutory measures. The "problem of accommodation" with respect to a specific regulatory statute and the antitrust laws was resolved in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, and the Court noted that the Transportation Act "is the later in time and constitutes not only a more recent but a more specific expression of policy" (321 U. S. at 79). The Court held that the Interstate Commerce Commission "has no power to enforce the Sherman Act as such" (*id.* at 79), but that if the Commission is "faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view," the Commission

"cannot, without more, ignore the latter" (*id.* at 80). Specifically, the Court held that in authorizing the particular consolidation at issue in the case, the Congress "did not import the general policies of the antitrust laws as a measure of their permissibility" presumably because the Congress "took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*id.* at 85).

"That there is a national policy favoring competition cannot be maintained today without careful qualification." *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91. "It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute" (*id.* at 92). The Court, in the *RCA* case, *supra,* reversed the order of the Federal Communications Commission—which authorized the Mackay Radio and Telegraph Company to establish additional radiotelegraph facilities—because the Commission had applied what it believed to be the national antitrust policy instead of the policy set forth in the Federal Communications Act. 346 U. S. at 90–98. In rejecting the argument of RCA Communications, Inc., that the decision of the Commission was also erroneous because "the grant of authorization to Mackay would violate § 314 of the

Communications Act, which forbids common ownership, control or operation of radio and cable in international communication whose purpose or effect may be substantially to lessen competition, restrain commerce or unlawfully to create a monopoly" (*id.* at 97), the Court held that "arguments based on comparable language in the Clayton Act and on decisions under that Act and under the Sherman Law cannot, we think, be sustained. What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry" (*id.* at 98). See, also, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224.

The "antitrust laws can have only limited application to industries regulated by specific statutes. Those laws, though quite properly viewed as having been intended 'to make of ours * * * a competitive business economy,' are not constitutional mandates * * *. We think it obvious that they may not be extended beyond that part of the economy which Congress intended to leave to the operation of the free market. 'Certainly what Congress has forbidden by the Sherman Act it can modify.'" *Pennsylvania Water & Power Co.* v. *Federal Power Com'n.*, 193 F. 2d 230, 234 (C. A. D. C.), affirmed, 343 U. S. 414. Where a "statute provides for comprehensive and detailed reg-

ulation of a particular industry * * * there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions" (193 F. 2d at 235).

In view of the comprehensive expression of the congressional purpose as to the stockyard industry set forth in the Packers and Stockyards Act including, specifically, regulation "with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*McLean Trucking Co.* v. *United States, supra,* 321 U. S. 67, 85), the regulations at issue in this case must be tested by the standards of the Packers and Stockyards Act, and here, as in *Federal Communications Commission* v. *RCA Communications, Inc., supra,* 346 U. S. 86, 98, the statutory standards in the Packers and Stockyards Act should be construed "in the light of the special considerations that have influenced Congress to make specific provision for the particular industry."

It was made plain by the Judicial Officer that he was "not by this decision saying that Item 10 (e) of respondent's regulations is valid under the Federal antitrust laws" (R. 32). Specifically, the Judicial Officer stated that the record is lacking "in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter. We can-

not find on the basis of the facts before us that Item 10 (c) forecloses competitors from any substantial market; that the volume of business affected by the contested regulations is significant or substantial; and that the regulation necessarily tends to the accomplishment of monopoly" (R. 30–31).

The Judicial Officer also stated that the "evidence in this proceeding is not sufficient to enable us to determine the status of the complainant and respondent in the proscribed area, that is, the extent of competition, the degree of monopoly power of respondent, if any, at Denver or in the proscribed area or whether monopoly power, if possessed, has been used to foreclose competition, to gain a competitive advantage or to destroy a competitor" (R. 31–32). "The problems posed by the alleged monopoly and restraint of trade in this proceeding are unique and before Item 10 (c) can be properly related to the antitrust laws it is necessary that there be a great deal more in the way of a record than we have here" (R. 32). The Judicial Officer concluded that we "are not by this decision saying that Item 10 (c) of respondent's regulations is valid under the Federal antitrust laws. We merely hold that the record is insufficient for a determination that Item 10 (c) violates such laws" (R. 32).

A decision with respect to whether the Judicial Officer correctly decided that the regulations are not invalid on their face is facilitated, we believe, if the significant limitations, with respect to the scope of the regulations, on their face, are sharply chiseled and if the significant facts as to the effect of the regulations

on the marketing of livestock—or, more accurately, the absence of facts—are briefly outlined.

a. The regulations do not, on their face, relate in any way to the fixing of prices. The rates charged by the market agencies and stockyard owners are regulated by the Secretary of Agriculture. 7 U. S. C. 1952 ed. §§ 206, 207, 209–212.

b. The regulations do not, on their face, indicate any agreement by any stockyard owners as to a division of territories. Every stockyard owner is free to advertise for business in the area designated in the Denver regulations and the market agencies operating at other stockyards are free to solicit, actively, business in the area.

c. The regulations do not, on their face, preclude a farmer from sending his livestock to any stockyard or to any purchaser or person of his choice. The farmers are free to select any market for the sale of their livestock.

d. There is no evidence that the Denver stockyard has any monopoly power to compel the movement of any livestock to the Denver stockyard.

e. The regulations do not, on their face, afford a basis for presuming that any competitor will be foreclosed from any substantial market.

(i) There is no evidence in the record of any "competitor" of the Denver stockyards. One of the "particularly significant" trends in the marketing of livestock is that terminal markets "are, with few exceptions, becoming local markets, drawing most of their salable receipts from immediately adjacent trade territory."

Suggestions for Improving Services and Facilities at Public Terminal Stockyards, (Agriculture Handbook No. 36, Livestock Branch, Production and Marketing Administration, U. S. Department of Agriculture, 1952), p. 4. Hence the existence of competing stockyards which draw livestock from the area prescribed in the regulations should not be presumed.

(ii) The regulations do not "foreclose" any possible competing stockyards. The regulations apply only to persons operating at the Denver stockyards. The other stockyard owners are free to advertise in the territory specified in the Denver regulations and the market agencies operating at other stockyards are free to solicit business in the specified territory.

(iii) There is no evidence that prior to the promulgation of the regulations there was a substantial flow of livestock from the area specified in the Denver regulations to other stockyards or that the regulations have changed the flow of livestock in any manner.[33]

f. The respondent in this Court is a market agency, *i. e.*, the respondent is engaged in the business of buying or selling livestock on commission at the Denver Union stockyard (7 U. S. C. 1952 ed.

[33] It may be assumed, on the basis of the affidavits filed in support of the motion by the Denver Union Stock Yard Company for a subpoena *duces tecum* (R. 51–54, 64–70), that the complainant in the administrative proceeding a market agency, was diverting some livestock from the Denver stockyard. But there is no basis for an assumption that the diversion was to a competing stockyard, if any *i. e.*, the diversion may have consisted entirely of transactions from the farm to a packer or other purchaser. Under the regulations, the farmers are free to deal directly with a packer or other purchaser.

§ 201 (c) (1)). The stockyard owner furnishes the market place at which the respondent operates and provides *free* facilities to the market agencies and dealers engaging in business at the stockyard, *supra*, pp. 66–67. The stockyard does not exist for the benefit of the market agencies. Rather the market agencies are part of the working staff at the stockyard to facilitate the flow of livestock from the farms to the purchasers. See *Stafford* v. *Wallace*, 258 U. S. 495, 497–499; *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (D. Minn.). The impact of the regulations, as to the market agencies, is on an integral part of the working force at the stockyard, and the regulations require, in certain respects, that the market agencies refrain from diverting from the Denver stockyards the normal flow of livestock to this market. See *Federal Trade Comm.* v. *Curtis Co.*, 260 U. S. 568, 581–582; *Lawlor* v. *National Screen Service Corporation*, 238 F. 2d 59, 65 (C. A. 3), judgment vacated, 352 U. S. 992.

g. There is no evidence in the record as to how the regulations have been interpreted or applied or what effect they have had, if any.

The decision of the Judicial Officer that the validity of the regulations could be determined only after a careful analysis of the relevant facts is consistent with numerous decisions. For example, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, involving the validity of a rule established by the Chicago Board of Trade prohibiting its members from purchasing or offering to purchase during a certain period of each day any wheat, corn, oats, or rye "to arrive" at a price other than the closing bid at the

"Call," *i. e.*, the session of the Board at which sales "to arrive" are made, the Government's case "was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law." But the Court held that "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Ibid.*

Similarly, the decisions with respect to trade associations and other similar industry enterprises demonstrate that the particular facts in each case determine the legality of activities which may operate to restrain trade. In *Sugar Institute* v. *United States*, 297 U. S. 553, 597–598, the Court held that "[q]uestions of reasonableness are necessarily questions of relation and degree" and that "each case demands a close scrutiny

of its own facts" (297 U. S. at 600).[34] Based upon a transcript of over 10,000 pages of testimony and more than 900 exhibits consisting of many thousands of pages (297 U. S. at 571, fn. 1), the Court held that certain activities of the Sugar Institute cut off opportunities for variation, in the course of competition, as to price and, therefore, were invalid under the Sherman Act.

There is no factual basis in the record on which to invalidate the regulations as a matter of law. The various circumstances and cases were carefully considered in the decision of the Judicial Officer (R. 28–32), and there is no foundation in the record for a holding that the regulations are illegal as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment the Court of Appeals should be reversed and the decision of the Judicial Officer, dismissing the complaint, should be affirmed.

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SEPTEMBER 1957.

[34] See, also, *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360–361, 378.

APPENDIX

The following are the relevant provisions of the Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*):

SEC. 2. (*a*) When used in this chapter—

* * * * *

(4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead; (7 U. S. C. 1952 ed. § 182 (4))

* * * * *

STOCKYARDS AND STOCKYARD DEALERS

SEC. 301. When used in this chapter—

(*a*) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(*b*) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(*c*) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(*d*) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. (7 U. S. C. 1952 ed. § 201.)

SEC. 302. (*a*) When used in sections 201–

203 and 205–217a of this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Said sections shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(*b*) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the definition contained in subsection (*a*) of this section, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of sections 201–203 and 205–217a of this title until like notice is given by the Secretary that such stockyard no longer comes within the definition contained in subsection (*a*) of this section. (7 U. S. C. 1952 ed. § 202.)

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this title by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section

shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. (7 U. S. C. 1952 ed. § 203.)

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title. (7 U. S. C. 1952 ed. § 205.)

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (7 U. S. C. 1952 ed. § 206.)

SEC. 306. (*a*) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 202 of this title, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing

all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(*b*) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(*c*) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(*d*) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(*e*) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without com-

plaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(*f*) After the expiration of the sixty days referred to in subsection (*a*) of this section, no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall

not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(*g*) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(*h*) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both. (7 U. S. C. 1952 ed. § 207.)

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (7 U. S. C. 1952 ed. § 208.)

* * * * *

SEC. 309. (*a*) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 205–207 or 208 of this title, or of an order of the Secretary made under sections 201–203 and 205–217a of this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition

which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(*b*) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subsection (*a*) of this section.

(*c*) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201–203 and 205–217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(*d*) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(*e*) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(*f*) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (7 U. S. C. 1952 ed. § 210.)

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in

connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(*a*) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(*b*) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed. (7 U. S. C. 1952 ed. § 211.)

SEC. 311. Whenever in any investigation under the provisions of sections 201–203 and 205–217a of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or prac-

tice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (7 U. S. C. 1952 ed. § 212.)

* * * * *

SEC. 316. For the purposes of sections 201–203 and 205–217a of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of said sections, and to any person subject to the provisions of said sections. (7 U. S. C. 1952 ed. § 217.)

SEC. 317. (*a*) The Secretary may, upon written application made to him, and if he deems it necessary, authorize the charging and collection, at any stockyard subject to the provisions of this chapter, by any department or agency of any State in which branding or marking or both branding and marking livestock as a means of establishing ownership prevails by custom or statute, or by a duly organized livestock association of any such State, of a reasonable and nondiscriminatory fee for the inspection of brands, marks, and other identifying characteristics of livestock originating in or shipped from such State, for the purpose of determining the ownership of such livestock. No charge shall be made under any such authorization until the authorized department, agency, or association has registered as a market agency. No more than one such authorization shall be issued with respect to such inspection of live-

stock originating in or shipped from any one State. If more than one such application is filed with respect to such inspection of livestock originating in or shipped from any one State, the Secretary shall issue such authorization to the applicant deemed by him best qualified to perform the proposed service, on the basis of (1) experience, (2) financial responsibility, (3) extent and efficiency of organization, (4) possession of necessary records, and (5) any other factor relating to the ability of the applicant to perform the proposed service. The Secretary may receive and consider the recommendations of the commissioner, secretary, or director of agriculture, or other appropriate officer or agency of a State as to the qualifications of any applicant in such State. The decision of the Secretary as to the applicant best qualified shall be final.

(*b*) The provisions of sections 201–203 and 205–217a of this title relating to the filing, publication, approval, modification, and suspension of any rate or charge for any stockyard service shall apply with respect to charges authorized to be made under this section.

(*c*) Charges authorized to be made under this section shall be collected by the market agency or other person receiving and disbursing the funds received from the sale of livestock with respect to the inspection of which such charge is made, and paid by it to the department, agency, or association performing such service.

(*d*) The Secretary may, if he deems it to be in the public interest, suspend, and after hearing, revoke any authorization and registration issued under the provisions of this section or any similar authorization and registration issued under any other provision of law. The order of the Secretary suspending or revoking any such authorization and registration shall not be subject to review. (7 U. S. C. 1952 ed. § 217a.)

GENERAL PROVISIONS

* * * * *

SEC. 402. For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 46 and 48–50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this chapter and to any person subject to the provisions of this chapter, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this chapter in any part of the United States. (7 U. S. C. 1952 ed., § 222.)

* * * * *

SEC. 407. The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. (7 U. S. C. 1952 ed. § 228.)

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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1957

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF AGRICULTURE

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INDEX

	Page
The regulations issued by the stockyard owner are not, as a matter of law, violative of the requirements of the Packers and Stockyards Act	1
A. The respondent contends, in its brief, that a stockyard owner and, also, the respondent, as a market agency, are public utilities, but if so the regulations are not, as a matter of law, invalid	1
B. The duties of a stockyard owner are set forth in the Packers and Stockyards Act, and the regulations in this case are not, as a matter of law, violative of those statutory provisions	5
C. There is nothing in the "posture of the case" which requires or permits the Court to hold the regulations invalid as a matter of law	12
D. The administrative workability of the Act is dependent on the consideration of the relevant facts with respect to the regulations; and the Secretary's interest, in this respect, is immediate and direct	14
Conclusion	15
Statutes:	
Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*):	
7 U. S. C. 1952 ed. § 203	2
7 U. S. C. 1952 ed. § 205	6, 11
7 U. S. C. 1952 ed. § 208	6, 8
7 U. S. C. 1952 ed. §§ 210–213	8
7 U. S. C. 1952 ed. § 228	8
5 U. S. C. 1952 ed. §§ 1032, 1038, 1040	15

CITATIONS

Cases:	
Bilton Machine Tool Co. v. *United Illuminating Co.*, 110 Conn. 417, 148 A. 337	3
Birmingham v. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39	3

457046—58——1

Cases—Continued

	Page
Cincinnati, N. O. & Tex. Pac. Railway v. *Interstate Com. Comm.*, 162 U. S. 184	3
Currin v. *Wallace*, 306 U. S. 1	14
Dairymen's League Cooperative Ass'n v. *Brannan*, 173 F. 2d 57 (C. A. 2)	13
Donovan v. *Pennsylvania Company*, 199 U. S. 279	4
Elk Hotel Co. v. *United Fuel Gas Co.*, 75 W. Va. 200, 83 S. E. 922	3, 4
Estate of Sanford v. *Commissioner*, 308 U. S. 39	13
Express Cases, 117 U. S. 1	3, 8, 9
Interstate Com. Comm. v. *Baltimore & O. Railroad*, 145 U. S. 263	3, 4
People ex rel. New York Edison Co. v. *Public Service Com.*, 191 App. Div. 237, 181 N. Y. Supp. 259	3
Sioux City Stockyards Co. v. *United States*, 49 F. Supp. 801 (3-Judge Court, N. D. Iowa)	8
Stafford v. *Wallace*, 258 U. S. 495	2
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381	14
Swift & Co. v. *Hocking Valley Ry.*, 243 U. S. 281	13
Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S. 92	4

Miscellaneous:

Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161	2, 8, 9
In the Matter of Pillsbury Mills, Inc., F. T. C. Doc. No. 6000	14
The Denver Union Stock Yard Company, Tariff 14, item 3 (c)	11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF AGRICULTURE

We shall not attempt, in this reply brief, to repeat or restate the arguments already set forth in our main brief. A few paragraphs will suffice to focus the issues and to mark out some of the irrelevant and erroneous arguments in the respondent's brief.

THE REGULATIONS ISSUED BY THE STOCKYARD OWNER ARE NOT, AS A MATTER OF LAW, VIOLATIVE OF THE REQUIREMENTS IN THE PACKERS AND STOCKYARDS ACT

A. THE RESPONDENT CONTENDS, IN ITS BRIEF, THAT A STOCKYARD OWNER AND, ALSO, THE RESPONDENT, AS A MARKET AGENCY, ARE PUBLIC UTILITIES, BUT IF SO THE REGULATIONS ARE NOT, AS A MATTER OF LAW, INVALID

The Denver Union Stock Yard Company is characterized by the respondent, in its brief, p. 1, as "a public

utility," and emphasis is given to the characterization by repeating it throughout the argument in the respondent's brief.[1] It is also made plain in the respondent's brief, p. 20, that the respondent, as a market agency at the Denver stockyard, is a public utility "no less than the stockyard."[2] Although the respondent unqualifiedly asserts, in its brief, p. 24, that "[b]eing a public utility, Denver Union Stockyard Company must furnish services to respondent and other market agencies and dealers," nonetheless the respondent nowhere demonstrates, in its brief, (1) that the regulations which are challenged in this case are to be tested, as a matter of law, by whether

[1] It was said in *Stafford* v. *Wallace*, 258 U. S. 495, 516, that the Packers and Stockyards Act "treats the various stockyards of the country as great national public utilities to promote the flow of commerce * * *." The Act does not, however, "require that a stockyard establish any need for its existence in the way of obtaining a license or a certificate of public convenience and necessity. Posting of the stockyard [by the Secretary] makes it and the transactions at the stockyard * * * subject to the supervision and control of the Secretary but confers no franchise or charter upon the stockyard company. Fundamentally Title III [of the Act] superimposes the [A]ct's supervision and control upon an industry which has its own rules and regulations such as those of the stockyard company and, at terminal stockyards, those of the Livestock Exchange consisting of the market agencies at the stockyard * * *." Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 165–166.

[2] A market agency, i. e., a person who engages in the business of buying or selling livestock, on a commission basis, at a posted stockyard or otherwise furnishing stockyard services, must register with the Secretary of Agriculture. 7 U. S. C. 1952 ed. § 203. One of the evils to be prevented by the Packers and Stockyards Act is collusion between market agencies and packers and dealers. *Stafford* v. *Wallace*, 258 U. S. 495, 515.

the Denver stockyard and, also, the respondent, as a market agency at the Denver stockyard, are public utilities, and, if so, (2) that the regulations are violative of the duty of a public utility, i. e., the stockyard owner, to furnish services to another concern, i. e., the respondent, which is also a public utility.

The respondent also fails—in asserting that the Denver stockyard is a public utility and that the respondent, as a market agency, is a public utility also—to recognize that public utilities at common law were not under an absolute or unconditional duty to furnish services, and "[i]t was even doubted whether they were bound to make the same charge to all persons for the same service." *Interstate Com. Comm.* v. *Baltimore & O. Railroad,* 145 U. S. 263, 275. The duty of a public utility to render services is merely a duty to render services which, in the circumstances, are reasonable. *Interstate Com. Comm.* v. *Baltimore & O. Railroad, supra,* 145 U. S. at 283–284; *Birmingham* v. *Rice Bros.,* 238 Iowa 410, 26 N. W. 2d 39, 42–43, certiorari denied, 338 U. S. 768; *Elk Hotel Co.* v. *United Fuel Gas Co.,* 75 W. Va. 200, 83 S. E. 922, 923–925; *People ex rel. New York Edison Co.* v. *Public Service Com.,* 191 App. Div. 237, 181 N. Y. Supp. 259. See, also, *Express Cases,* 117 U. S. 1, 24–29. For example, "[d]iscrimination as to service and rates may be based upon a reasonable classification." *Bilton Machine Tool Co.* v. *United Illuminating Co.,* 110 Conn. 417, 148 A. 337, 340. See also, *Cincinnati, N. O. & Tex. Pac. Railway* v. *Interstate Com. Comm.,* 162 U. S. 184, 193–194; *Interstate Com.*

Comm. v. *Baltimore & O. Railroad, supra,* 145 U. S. at 283–284.

"Only unreasonable and unjust discriminations [by a public utility] are unlawful," and "[n]o invariable rule or exact standard for determining what transactions are unlawful because discriminatory or preferential has been, and from the very nature of the case can be, definitely prescribed" because whether the services are reasonable is a question of fact "to be resolved upon a consideration of the proofs in each case; the burden always being on the complaining party." *Elk Hotel Co.* v. *United Fuel Gas Co.,* 75 W. Va. 200, 83 S. E. 922, 924. It is a "question of fact whether, upon the differences thus shown [in the testimony], there was an unjust discrimination." *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U. S. 92, 103.

No evidence was received, however, in the administrative proceeding in the case at bar, inasmuch as the respondent—i. e., the complainant in the administrative proceeding—elected to stake the case on the proposition that the regulations in this proceeding under the Packers and Stockyards Act are, on their face, invalid as a matter of law (R. 72, 74–75). There can be no doubt that a public utility, so long as it furnishes reasonable service to its patrons, is not, as a matter of law, precluded from establishing "such reasonable rules, in respect to the use of its property, as the public convenience and its interests may suggest * * *." *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, 293. As was said by the Court of Appeals in the case at bar, a public utility "may prescribe rules

for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory regulations to that end" (R. 80).

The regulations in this case apply to the respondent in its capacity as a market agency—i. e., a business concern which describes itself as a public utility, and which is registered with the Secretary to buy and sell livestock at the Denver stockyard on a commission basis—and the regulations, by their terms, are designed to prevent a market agency, while transacting business at the stockyard, from engaging in the practice of interfering with the normal flow of livestock to the Denver market or diverting livestock out of the normal flow to the Denver market (R. 12–13, 39). Even if the stockyard owner and, also, the respondent, as a market agency, are public utilities, nonetheless the regulations are not invalid unless on the record of the evidence, in a rogatory proceeding, it is concluded that the regulations are unreasonable. In addition, as shown in the following section of our brief, there is no reference to public utilities as such in the Packers and Stockyards Act.

B. THE DUTIES OF A STOCKYARD OWNER ARE SET FORTH IN THE PACKERS AND STOCKYARDS ACT, AND THE REGULATIONS IN THIS CASE ARE NOT, AS A MATTER OF LAW, VIOLATIVE OF THOSE STATUTORY PROVISIONS

The respondent refers, in its brief, to the Packers and Stockyards Act, but fails to take into account that the issues in this proceeding are within the compass of the Packers and Stockyards Act. This pro-

ceeding was instituted by the respondent under the Packers and Stockyards Act (R. 39–42), and the centric issue is whether the regulations issued by the stockyard owner are, as a matter of law, illegal under the Packers and Stockyards Act (R. 72, 74–75), which provides, *inter alia,* that it is "the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services" at a stockyard, which is posted for regulation under the Act, and to establish, observe, and enforce "just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services" (7 U. S. C. 1952 ed. §§ 205 and 208).

The applicancy of the Act is not dependent on whether a stockyard, such as the one which is owned and operated by the Denver Union Stock Yard Company, and a market agency, such as the respondent, are public utilities. The statute is based on the commerce clause in the Constitution and contains no reference to public utilities as such. The prime issue in the case is for resolution under the provisions of the Packers and Stockyards Act with respect to the duty of a stockyard owner to issue, observe, and enforce just, reasonable, and nondiscriminatory regulations relative to the furnishing of reasonable stockyard services.

The Court of Appeals decided the case on the basis of an imaginary or hypothetical situation in the market, with respect to the application of the regulations, and concluded that the regulations would be illegal in the imaginary or hypothetical situation

(R. 82). Accordingly the Court of Appeals concluded that the regulations are illegal on their face under the terms of the Packers and Stockyards Act (R. 83–84). It is significant that the respondent fails to undertake, in its brief, to discuss or try to distinguish the decisions of this Court which we cited in our main brief, pp. 54–58, for the principle that courts in passing on the validity of regulations, under an Act of Congress, are to dispose of the case on the basis of the facts disclosed, never on the basis of assumed or imaginary facts. The respondent avoids, in its brief, a discussion of the prior holdings by this Court by avoiding any mention of those cases.

In view of the respondent's assertions, in its brief, p. 53, that it would be a "waste of time" to develop the evidence with respect to the applicability and impact of the regulations, i. e., as to whether the regulations are reasonable in view of the wide-ranging conditions in the market, it is significant that the respondent fails, in its brief, to undertake to discuss or even to try to distinguish the catalog of circumstances in the livestock industry which we referred to in our main brief, pp. 66–73, and which may be relevant in resolving a factual issue as to the reasonableness of the contested regulations.

The respondent makes it plain in its brief, pp. 20–21, that it is a public utility—in its capacity as a market agency for the buying and selling of livestock, on a commission basis, at the Denver market—and that the Stock Yard Company is also a public utility, but significantly there is nothing in the respondent's

brief—and, of course, nothing in the record—to show that the regulations as applied to the respondent, in its capacity as a market agency, will result in a denial of reasonable stockyard services at the Denver market. It is in its capacity as a market agency that the respondent is a litigant in this case.

In the many auction stockyards, regulated under the Packers and Stockyards Act, the stockyard services of selling livestock are performed insofar as a market agency is concerned by the stockyard owner, and no one else.[9] It cannot be doubted that, as was said in *Express Cases*, 117 U. S. 1, 24, with respect

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[9] The Judicial Officer said, in this case, that the relationship between a stockyard owner and a market agency is "within the jurisdiction of the Secretary under the [A]ct as a matter in respect to the furnishing of stockyard services at a stockyard" (R. 19). See also, *Sioux City Stockyards Co. v. United States*, 49 F. Supp. 801, 802–804 (3-Judge Court, N. D. Iowa); Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 171–172. It is the duty of a stockyard owner and a market agency to issue just, reasonable, and nondiscriminatory regulations with respect to the furnishing of stockyard services (7 U. S. C. 1952 ed. § 208), and the issuance of any such regulation is subject to administrative supervision under the Packers and Stockyards Act (7 U. S. C. 1952 ed. §§ 210–213, 228).

[10] "Posted stockyards may be either markets for which the stockyard company furnishes the plant and facilities for the sale of livestock by market agencies such as is the case at the terminal stockyards * * * or auction stockyards at which the stockyard operator sells the livestock at auction. In the terminal stockyards the livestock is generally sold for the consignor by commission merchants, that is, market agencies which sell the livestock on a commission basis. The usual method of sale here is by private treaty rather than by auction because the market agency negotiates with one prospective purchaser at a time. The stockyard company's charges for yardage and feed and the selling agency's commission are deducted from

to the alleged right of an express company to the use of railroad property, "[s]o long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them." It was held in the *Express Cases, supra*, 117 U. S. at 24, that the "railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

There is nothing to show, in the record in this case, that the farmer-patrons of the Denver market will be denied reasonable stockyard services. The only complaint is by the respondent, a market agency, which is registered to "buy and sell livestock on a commission basis at the Denver Union Stockyard * * *" (R. 11). It is alleged by the respondent, in its complaint in the administrative proceeding, that in view of the respondent's business operations the regulations will result in the denial to "growers in the proscribed area [of] the service and advice they are justly entitled to" (R. 41–42). But the averments

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the proceeds of the sale and the balance remitted to the shipper. The shippers consign their livestock to a specific commission firm for sale or in many cases the shipper may leave to the trucker of his livestock the selection of a market agency. The buyers at the stockyard are market agencies who buy for their principals upon a commission basis, dealers who buy for their own account and for resale, packer-buyers who purchase slaughter livestock for their employers, or farmers who buy livestock for feeding or other purposes." Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 166–167.

by the respondent were denied in the answer filed by the Denver Union Stock Yard Company (R. 45–46), and by way of reconvention the cross demand was made that "strict proof thereof" be made as to the factual allegations and conclusions in the complaint in the administrative proceeding (R. 45). The respondent, as the complainant in the administrative proceeding, abandoned its factual allegations, and stated that it "will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law" (R. 72). Hence the record contains no evidence. Although we do not know what evidence would have been adduced, if a full hearing had been held, it must be recognized that, indeed, the evidence might have justified the conclusion that the regulations are within the zone of reasonableness.

The respondent's reliance, in its brief, pp. 21–36, on cases involving the duty of a public utility to its patrons, is misplaced. The case at bar involves, according to the respondent's firm position (brief, pp. 20–21), a controversy between two public utilities, *scil.*, the respondent, a market agency, and the Stock Yard Company, a stockyard owner. However, any farmer-patron of the Denver market is free to market his livestock at the Denver market. Not only are there numerous dealers and market agencies at the market, but in addition it is provided in the regulations of the Denver Union Stock Yard Company that "[a]ny owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without dis-

crimination reasonable facilities and services."[5] The complaint, in this case, is by a market agency which is engaged in the business of buying and selling livestock, on a commission basis, at the Denver market. The record fails to show any impairment of the stockyard services to farmer-patrons of the market, and the cases relied on by the respondent are not, in these circumstances, in point.

The uniform treatment of nonuniform conditions is not made mandatory by the statutory provision that a stockyard owner or market agency shall "furnish upon reasonable request, without discrimination, reasonable stockyard services" (7 U. S. C. 1952 ed. § 205). The variant and divergent circumstances incident to the feeding, holding, and marketing of hogs, cattle, sheep, and other livestock, at a posted stockyard, make it obvious that in furnishing facilities or other services a stockyard owner or a market agency may reasonably differentiate between situations and may, when reasonable, refuse to furnish certain facilities or other services and may, when reasonable, refuse to furnish any facilities or services. If a stockyard owner or market agency could not reasonably differentiate between different conditions the resulting system of rigid uniformity would manifestly be destructive of the principle of "reasonable stockyard services." The respondent makes it plain in its brief, p. 21, that a market agency may reasonably differentiate between

[5] Tariff 14, item 3 (c). The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D. C.

conditions in the furnishing of stockyard services and may, e. g., refuse to furnish stockyard services with respect to "stolen, mortgaged, or other livestock wrongfully offered" for marketing. In our main brief, pp. 49–51, we refer to the cases and administrative practice which show that reasonable classification or differentiation is allowable in the furnishing of facilities and other services by a stockyard owner or a market agency. As to whether a refusal to furnish facilities or other services is reasonable depends, of course, on an evaluation of the facts in the particular situation.

C. THERE IS NOTHING IN THE "POSTURE OF THE CASE" WHICH REQUIRES OR PERMITS THE COURT TO HOLD THE REGULATIONS INVALID AS A MATTER OF LAW

The respondent's statement, in its brief, pp. 6–8, of the "posture of the case" is not correct. The respondent contends in its brief, p. 8, that the Stock Yard Company assumed the position, in its pleadings, "that the [r]egulation's validity could be determined as a matter of law upon its face." But that argument is antithetical to the Stock Yard Company's position in the entire proceeding. The respondent, as the complainant in the administrative proceeding, filed a complaint which would have afforded the basis for a complete factual inquiry as to the validity of the regulations (R. 39–42), but after the Hearing Examiner indicated that the request of the Stock Yard Company for a subpoena *duces tecum* would be granted (R. 70–71), the respondent, as the complainant in the administrative proceeding, elected to submit the case on the proposition that the regulations are,

as a matter of law, invalid on their face (R. 72). Specifically, the respondent Association stated that it would not present evidence, "as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law" (R. 72). The motion to dismiss filed by the Stock Yard Company was based on its disagreement with the position of the Association. The Stock Yard Company moved to dismiss the complaint because of the complainant's failure to submit evidence (R. 73).

The issue presented to the Judicial Officer was whether the regulations are, as a matter of law, invalid on their face. No one except the Producers Livestock Marketing Association contended or admitted that the validity of the regulations could be determined on their face in the absence of a factual hearing. The Judicial Officer ruled that the validity of the regulations could not be determined in the absence of the relevant facts (R. 15–32), and as we have shown in our main brief, pp. 23–85, the ruling of the Judicial Officer is in accordance with law.

Assuming, *arguendo*, that both parties in the administrative proceeding had agreed that the validity of the regulations is to be determined, as a matter of law, by merely reading the regulations, nonetheless such agreement involves a conclusion of law and, as such, is not binding on the administrative agency or on the courts. *Swift & Co.* v. *Hocking Valley Ry.*, 243 U. S. 281, 289; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 51; *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57, 65 (C. A. 2), certiorari denied, 338 U. S. 825.

D. THE ADMINISTRATIVE WORKABILITY OF THE ACT IS DEPENDENT ON THE CONSIDERATION OF THE RELEVANT FACTS WITH RESPECT TO THE REGULATIONS; AND THE SECRETARY'S INTEREST, IN THIS RESPECT, IS IMMEDIATE AND DIRECT

The statutory terms are applicable to a wide variety of market conditions, as shown in our main brief, pp. 23–73, and the effectiveness of administration is dependent on the consideration and evaluation of the relevant facts with respect to the regulations as to stockyard services in a particular market. Regulatory legislation is, of course, often applicable to "conditions involving details with which it is impracticable for the legislature to deal directly" (*Currin* v. *Wallace*, 306 U. S. 1, 15), and flexibility and dispatch are the salient virtues of the administrative process in applying broad statutory terms to a particular set of facts (*Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 398).

The position of the Secretary is, in this respect, similar to the position of the Federal Trade Commission in *In the Matter of Pillsbury Mills, Inc.*, F. T. C. Doc. No. 6000, decided December 28, 1953, *scil.*:

> The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." It contemplated clarification and completion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears. If a particular

> competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review * * * no longer remain[s]. In such event the administrative agency may as well give way to the prosecutor.

Contrary to the respondent's assertion, in its brief, pp. 59–60, that the Secretary is only a "nominal party," the interest of the Secretary is fundamental in the discharge of his administrative duties in this wide-ranging program. Plainly, the Congress has authorized the Secretary to participate "as of right" in this litigation and be independently represented by counsel. 5 U. S. C. 1952 ed. §§ 1032, 1038, 1040. The respondent's contention that the Secretary is a nominal party merely exemplifies the respondent's failure, in its brief, to address its argument to the case before the Court.

CONCLUSION

For the foregoing reasons, in addition to those in our main brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the judgment of the Judicial Officer, dismissing the complaint, should be affirmed.

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IN THE SUPREME COURT
of the
UNITED STATES
OCTOBER TERM, 1956 7

No. ~~781~~ 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT
Opposing Petition For Writ Of Certiorari By Ezra Taft Benson, Secretary of Agriculture of the United States

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INDEX

Page

FOREWORD 1

QUESTION PRESENTED 6

STATEMENT OF THE CASE 8

ARGUMENT 10

1. Respondent Submits The Secretary's Petition For Writ Of Certiorari Upon Its Brief Of Respondent Opposing Writ Of Certiorari By Denver Union Stock Yard Company In No. 917 And Upon Additional Argument Here. 10

2. Arguments Of The Secretary Against The Decision Of The Court Of Appeals Are Without Merit. 11

CONCLUSION 13

TABLE OF CITATIONS

Page

Kelly vs. Union Stockyard and Transit Company (7 Cir.) 190 F. 2d 860 11

Producers Livestock Mktg. Assn. vs. U. S. and Benson, 241 F. 2d 192. ..... 3, 6, 12

Sig Ellingson and Company vs. DeVries (8 Cir.) 199 F. 2d 677. Cert. den. 73 S. Ct. 505. 11

Hobbs Act
5 U.S.C. §1034 3

5 U.S.C. §1038 3

5 U.S.C. §1040 ..... 5, 8, 9, 13

National Labor Relations Act
29 U.S.C. §160 4

Packers and Stockyards Act, 1921
7 U.S.C. §211 4

Rules, Court of Appeals, Tenth Circuit
28 U.S.C.A., p. 541, Rule 34-1 3

IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

No. 981

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
Ezra Taft Benson, Secretary of Agriculture
of the United States

FOREWORD

Respondent submits the Petition of the Secretary for Writ of Certiorari herein upon its "Brief of Res-

pondent Opposing Petition For Writ of Certiorari by Denver Union Stock Yard Company" already on file in an earlier proceeding, by Denver Union Stock Yard Company, seeking review of the decision of the Court of Appeals below, No. 917, October Term, 1956, but adds the matters herein set out.

The Secretary of Agriculture's Petition for Writ of Certiorari here (No. 981, filed May 8, 1957) is the *second* petition to seek review of the decision by the Court of Appeals below outlawing the Denver Stock Yard Company's shocking Regulation — as void in *law* upon its *face* — for refusing stockyard services to Respondent (a licensed livestock marketing agency at the stockyard) and others, if they shall deal in livestock in the country area of Colorado — *without routing the livestock to the Denver stockyard.*[1]

The Regulation was issued by the *stockyard.* It was *not issued or prescribed* by the Secretary or Department of Agriculture. The latter got into the case only as a *forum* — a *quasi* court or tribunal — to hear and try Respondent's complaint filed with the Department against the Stock Yard Company to *annul* the Regulation. The proceeding originated before the Secretary of Agriculture in this style (R. 6):

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1. The first Petition for Certiorari was filed April 17, 1957 by Denver Union Stock Yard Company, Petitioner, No. 917.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Producers Livestock Marketing Association, *Complainant,* vs. The Denver Union Stock Yard Company, *Respondent.*	P&S Docket No. 2176

The Secretary upheld the Regulation. The Court of Appeals reversed. On appeal to the Court of Appeals (Petition for Review) under the Hobbs Act (5 U.S.C. §1034) Respondent became *Petitioner* and the United States, *Respondent.* By rule of the Tenth Circuit (28 U.S.C.A., p. 541, Rule 34-1) the Secretary was also joined as *Respondent.* And the Stock Yard Company intervened "as of right" under the Hobbs Act, 5 U.S.C. §1038. Thus, the proceeding in the Court of Appeals was in the style shown in the margin.[2]

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2. UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah,
Petitioner,

vs.

UNITED STATES of AMERICA and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents,

DENVER UNION STOCKYARD COMPANY,
Intervener-Respondent.

(R. 1. 241 F. 2d 192. Secretary's Petition for Cert. P. 25)

It is quickly apparent that in reality, this is actually a *private* two-party controversy between two litigants: (1) Producers Livestock Marketing Association - complainant (plaintiff) in the complaint before the Secretary, and, (2) Denver Union Stockyard Company - respondent (defendant) in that complaint; and that although the Secretary of Agriculture was *forced* by the Hobbs Act to be made a party - respondent in the Court of Appeals, his presence there was only *nominal;* he and the Department of Agriculture having been only the *forum* or *tribunal* who heard and decided the case between the *two parties in interest* at the outset.

The Secretary did not *issue* or *prescribe* the Regulation. The stockyard did. The Secretary did not file or *initiate* any complaint or proceeding thereunder. Respondent - Producers Livestock Marketing Association - did. This is *not* a case where a Government officer or agency issued a complaint or seeks enforcement.[3] And the presence of the United States (a total stranger theretofore) as Respondent in the Court of Appeals is perplexing. The only justification for the Secretary and the United States being Respondents in the Court of Appeals is the command of the Hobbs Act, supra.

We have, then, two petitions for certiorari: one by a *real* party in interest — Denver Union Stock

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3. For example, not like the National Labor Relations Board's issuing a complaint for unfair labor practices. 29 U.S.C. §160. Nor did the Secretary, himself commence this case "on his own initiative", as permitted by the Packers & Stockyards Act. 7 U.S.C. §211 *Respondent* filed the complaint before the Secretary.

Yard Company; the other, by a *nominal* party, only — the Secretary. And, although the United States might also have appealed,[4] it has refused to do so and must, by refusal of the Attorney General and Solicitor General, be deemed to *approve* the decision of the Court of Appeals.

4. "Either the United States or the Agency or any *aggrieved* party may petition for writ of certiorari". Hobbs Act. 5 U.S.C. §1040.

QUESTION PRESENTED

To begin with, the two petitioners, the Stock Yard Company and the Secretary, cannot agree on the question presented. For example, the Stock Yard questions the Court of Appeals' ruling that a "full hearing" resulted in the proceeding before the Secretary, whereas, not one word of denial of "full hearing" as such appears in the Secretary's statement of the question involved. (Stock Yard Company's Petition, P. 3. Secretary's Petition, P. 2).

In No. 917, we expressed our disagreement with the Stock Yard Company's statement of the question presented. We said:

> " A single question, only, is presented:
>
> "Is the Regulation here on trial which was issued by the Denver Union Stock Yard Company (a public utility) legal upon its face as a matter of law?" (Brief of Respondent Opposing Certiorari. No. 917. P. 1).

The Secretary now *concedes*, for while he lists three questions in his Petition (P. 2), he later firmly acknowledges the ultimate and "basic" question to be as we have stated it, for he says the Secretary's Judicial Officer's decision was upon —

> "the basic issue, viz., whether the Regulations are, as a matter of law, illegal on their *face* . . .". (Secretary's Petition, P. 8).

and:

> ". . . the issue for decision is . . . but only the narrow question as to whether the Regulations are, as to matter of law, invalid on their *face*." (Id., P. 9).

We agree that is the *narrow* question involved. The Court of Appeals *decided* it was.[5] The Secretary *concedes* it is. Only the Stock Yard Company *contends* otherwise.

5. The Court of Appeals said: "The Regulation is invalid upon its face and the cause is accordingly remanded" etc. 241 F. 2d 197.

STATEMENT OF THE CASE

In earlier pages, we have shown how the case arose by Respondent's lodging a complaint before the Secretary and Department of Agriculture, that the latter upheld the Regulation on its *face*, but that the Court of Appeals reversed and held the Regulation was void on its *face*.

In reality, this is actually a *private* two-party law suit between Respondent (Producers Livestock Marketing Association) and Petitioner (Denver Union Stock Yard Company, in No. 917). The Secretary and Department of Agriculture were not parties, but only the *forum* who heard and tried the law suit before the Department. One of the parties — the Stock Yard Company — has appealed. The *forum* now appeals also. That is the forum's statutory right under the Hobbs Act. 5 U.S.C. §1040. But, the Act's bestowal of the right to appeal upon the *forum* or *tribunal* or *adjudicator*, itself, cannot lessen the awkwardness of the forum's position in casting aside its earlier role as *adjudicator* and donning, now, the role of litigant — thus taking sides on appeal to sustain its own decision below where it was forum and adjudicator only. True the Hobbs Act says the Secretary may reshuffle his position in that fashion, but the Department of Agriculture, nevertheless, is now cast in the role of litigant, whereas it was only adjudicator below — without interest there save only to decide impartially.

And, here we wish to point out that the United States — one of the Respondents below — has not

appealed, although the Hobbs Act permits it to do so, no less than the Secretary.[6] That can only mean one thing: that the Attorney General and Solicitor General are satisfied with the decision of the Court of Appeals.

6. 5 U.S.C. §1040.

ARGUMENT

1.

Respondent Submits The Secretary's Petition For Writ Of Certiorari Upon Its Brief Of Respondent Opposing Writ Of Certiorari By Denver Union Stock Yard Company In No. 917 And Upon Additional Argument Here.

Respondent submits the Secretary's Petition for Writ of Certiorari on Respondent's opposing brief in No. 917 above, but adds the matter herein.

2.

Arguments Of The Secretary Against The Decision Of The Court Of Appeals Are Without Merit.

The Secretary argues thus:

SOME STOCKYARDS LIMIT THE NUMBER OF PERSONS TO BE SERVED. True. They must. They can only handle so many. They are exactly like other public utilities — railroads, airlines, bus lines, etc., in that respect. When they reach a capacity load, they can serve no others. That is only common sense.

STOCKYARDS MAY DENY SERVICE TO CROOKS AND THIEVES. Certainly they may. *Kelly* vs. *Union Stockyard and Transit Company* (7 Cir.) 190 F. 2d 860. Cf. *Sig Ellingson and Company* vs. *DeVries* (8 Cir.) 199 F. 2d 677. Cert. den. 73 S. Ct. 505.

ADMINISTRATION OF PACKERS AND STOCKYARDS ACT CLAIMED TO BE RENDERED UNCERTAIN OR INDEFINITE BY COURT OF APPEALS DECISION. Not so. This was the Stock Yard's Regulation. *Not* the Secretary's. The stockyard would do its own administering; not the Secretary. The Secretary administered the *Act* before and without Denver's self-made Regulation. He can go on administering the *Act* despite the Regulation's being stricken down.

SIMILARITY OF REGULATIONS CLAIMED AT OTHER STOCKYARDS. The Secretary lists certain stockyards which he claims have regulations "similar" to the one here. There is no such proof upon this record. His sojourn is entirely *dehors*. But, since he

has elected to travel beyond this record, we can only reply and say that we are informed the regulations mentioned are not like the one here. They may *govern* the customer in certain respects, e.g., as to the use of stockyard facilities as such, etc., or even provide other proper restrictions, as the stockyards have a right to do, but, except for Los Angeles, and perhaps Baltimore and a small yard at Jonesboro, Arkansas, we are informed of none that are like the one on trial here — excluding those who may deal in the country and thus "lawfully trod upon its (stockyard's) economic toes".[7]

If at another stockyard, those affected may be willing to submit thereto — even acquiesce over a period of time and thus in law *accept* or *validate* a regulation similarly offensive to the one at Denver — let them, *not Respondent*, suffer the consequence of their acquiescence. The void Regulation here cannot be validated as against Respondent by the legal sophistry of pointing out another's acquiescence at some other stockyard.

---

7. Opinion below. 241 F. 2d 196.

CONCLUSION

Respondent submits::

1. This, in reality, is actually a private law suit between two parties only — Petitioner, the Stock Yard Company, and Respondent, a licensed market agency at the yard — over a Regulation issued by the Stock Yard Company itself.

2. The Secretary and Department of Agriculture did not *issue* or *prescribe* the Regulation on trial, nor would they have been charged with its enforcement or administration. They came into this *private* law suit only as a *forum* or *tribunal* or *adjudicator* to hear and decide as between the two litigants. The Hobbs Act[8] *forced* the Secretary to be named as Respondent on appeal to the Court of Appeals. Likewise, the United States of America. But, both the Secretary and the United States were only *nominal* parties — respondents.

3. While the Hobbs Act permits both *nominal* parties — the Secretary of Agriculture and the United States — to petition this Court for review, only the Secretary has done so.

4. The refusal of the United States to seek review can only be interpreted to mean: That the Attorney General and Solicitor General are satisfied with the decision of the Court of Appeals. Otherwise, they, too, would have sought to have it reversed.

5. A single question, only, is presented: Is the Regulation invalid upon its *face* as a matter of *law?*

---

8. 5 U.S.C. §1040.

The Court of Appeals held it was. We contend it is. The Secretary concedes that it is.

6. Respondent submits the Secretary's Petition for Writ of Certiorari upon:

— This Brief herein, and,

— The Brief of Respondent Opposing Petition For Writ of Certiorari by Denver Union Stock Yard Company already on file in No. 917, October Term, 1956.

7. The judgment of the Court of Appeals declaring the Regulation to be invalid upon its *face* as a matter of law and that the StockYard Company shall not be permitted to enforce it, is correct. The Petition of the Secretary of Agriculture for Writ of Certiorari must be denied.

Respectfully submitted,

May 1957

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No. 118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Petitioner*,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN STOCK YARDS ASSOCIATION, AMICUS CURIAE

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of Interest of the American Stock Yards Association	4
Summary of Argument	5
Argument	8
I. The Buying and Selling of Livestock by Commission Firms is a Privilege That May Be Restricted by Reasonable Regulations of a Stockyard Company	11
A. Under the Regulatory Plan a Stockyard Company Has Primary and Initial Authority to Adopt Reasonable Regulations for the Conduct of Its Business	11
B. Regulations of a Stockyard Company May Provide the Method Through Which the Service of Buying and Selling Livestock on a Commission Basis is Furnished	16
C. Under Stockyard Company Regulations Buying and Selling Livestock at a Stockyard by Commission Firms Is a Privilege	17
D. The Privilege Has Been Subjected to Numerous Varying Limitations by Stockyard Company Regulations, Including Limitations Relating to Interference With The Normal Flow of Livestock	21
II. An Evidentiary Hearing Would Have Shown That the Contested Regulation is in Furtherance of the Policy of Congress	24
III. The Judgment of The Court Of Appeals Unlawfully Denies the Right of the Stockyard Company to an Evidentiary Hearing	30
A. There are Genuine Material Issues Of Fact	30

Page

B. The Court of Appeals Judgment Would Convert the Administrative Proceeding Into One That Denies the Stockyard Company an Evidentiary Hearing. 33

C. The Stockyard Company Has a Right to an Evidentiary Hearing Before Its Regulation Is Held Invalid 35

D. The Court of Appeals is Not Authorized To Deprive the Secretary of Agriculture of His Primary Jurisdiction In The Matter... 36

E. The Court of Appeals is Not Authorized To Exercise Essentially Administrative Functions 37

Conclusion 38

TABLE OF CITATIONS

CASES:

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) 38
Ambassador, Inc. v. *United States*, 325 U.S. 317 (1945) 12, 37
Bass v. *Hoagland*, 172 F. 2d 205 (CA 5, 1949)..... 32
Cella v. *United States*, 208 F. 2d 783 (CA 7, 1953) 29
Chicago, St. Louis, and New Orleans R. Co. v. *Pullman Southern Car Co.*, 139 U.S. 79 (1891) 17
Daniels v. *United States*, 242 F. 2d 39 (CA 7, 1957) 29
Donovan v. *Pennsylvania Co.*, 199 U.S. 279 (1905).. 17
Far East Conference v. *United States*, 342 U.S. 570 (1952) 37, 38
Federal Communications Commission v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940)..... 38
Federal Power Commission v. *Idaho Power Company*, 344 U.S. 17 (1948) 38
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37 (1948) 38
Friedman v. *Washburn Company*, 145 F. 2d 715 (CA 7, 1944) 32
Houfburg v. *Kansas City, Stock Yards Company*, 283 S.W. 2d 539 (Mo., 1955)..... 12

Page

Interstate Commerce Commission v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913) ... 12, 14, 35
Kelly v. *Union Stockyards and Transit Co. of Chicago*, 190 F. 2d 860 (CA 7, 1951) 37
Lichten v. *Eastern Airlines*, 189 F. 2d 939 (C.A. 2, 1951) 12, 37
Morgan v. *United States*, 298 U.S. 468 (1936) 36
Morgan v. *United States*, 304 U.S. 1 (1938) 36
New England Divisions Case, 261 U.S. 184 (1923) 35
Platt v. *Lecocq*, 158 F. 723 (C.A. 8, 1907) 13
In re *Producers Livestock Marketing Association and Western Livestock Order Buyers*, 14 Agr. Dec. 109 (1955) 29
Smith, Gilbert R. v. *Union Stock Yards Company*, 9 Agr. Dec. 588 (1950) 20
Sugar Institute v. *United States*, 297 U.S. 553 (1936) 10
Sullivan v. *Union Stockyards Co.*, 26 F. 2d 60 (CA 8, 1928) 12
Swift and Company v. *United States*, 343 U.S. 373 (1952) 10
Tagg Brothers and Moorhead v. *United States*, 280 U.S. 420 (1930) 12
Texas and Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 13, 37
The Express Cases, 117 U.S. 1 (1886) 16
United States, v. *Fruit Growers Express Co.*, 279 U.S. 363 (1929) 17
United States v. *Morgan*, 307 U.S. 183 (1939) 13, 37
United States v. *Sklar*, 13 Agr. Dec. 583 (D.C. Texas, 1954) 29
United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) 37
Woerth v. *United States*, 231 F. 2d 822 (CA 8, 1956) 27, 29

STATUTES AND REGULATIONS:

Packers and Stockyards Act, 1921, 7 USC § 181, et seq.
Section 301(b) 16
Section 302(a) 16
Section 303 ..... 20, 27
Section 307 12
Section 310 ..... 12, 14, 33, 35, 36, 37
Section 407 15

Page

Code of Federal Regulations, Volume 9, Part 201

Section 201.4 15
Section 201.10 ..... 20, 28
Section 201.17 16
Section 201.31 28
Section 201.40 28
Section 201.43 28
Section 201.45 28
Section 201.47 28
Section 201.55 28
Section 201.58 28
Section 201.61(a) 15
Section 201.61-201.67 28
Section 201.63 23
Section 201.71 28
Section 201.73 28
Section 201.79(b) 20
Section 201.82 28

Statutes at Large

34 Stat. 589 11
36 Stat. 544 11
39 Stat. 734, 735 11
48 Stat. 1070, 1072 11
49 Stat. 558 11
52 Stat. 822, 823 11
52 Stat. 964 11
52 Stat. 992, 1018 11
54 Stat. 934, 937 11
56 Stat. 286, 288 11

United States Code

15 U.S.C. §§ 717c, 717d 11
46 U.S.C. §§ 816, 817 11
46 U.S.C. § 845a 11
47 U.S.C. §§ 201, 205 11
49 U.S.C. § 1(6) 11
49 U.S.C. § 15(1) 11
49 U.S.C. § 316 11
49 U.S.C. §§ 483, 642 11
49 U.S.C. §§ 905, 907 11
49 U.S.C. §§ 1004, 1006 11

CONGRESSIONAL DOCUMENTS: Page

House Document 1297, 65th Cong., 2d sess. 25
House Report 1297, 66th Cong., 3d sess. 25
House Report 77, 67th Cong., 1st sess. 11
House Report, 1048, 85th Cong., 1st Sess. 24, 27
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Meat Packing Industry (1918) 24, 25

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STOCKYARD COMPANY TARIFF REGULATIONS (see Appendix to this Brief):

Baltimore 1a
Buffalo 2a
Cincinnati 3a
Cleveland 4a
Denver 5a
Detroit 7a
Evansville 8a
Fargo 9a
Fort Worth 11a
Houston 12a
Indianapolis 12a
Kansas City 14a
Los Angeles 15a
Louisville 17a
Milwaukee 19a
Ogden 19a
Omaha 20a
Peoria 20a
Portland 20a

Page

St. Joseph 21a
St. Louis (Mississippi Valley) 22a
St. Louis (National) 22a
St. Paul 22a
Salt Lake 24a
San Antonio 24a
San Francisco 26a
Sioux City 26a
Sioux Falls 26a
Stockton 28a
Wichita 30a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN STOCK YARDS ASSOCIATION, AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed with consent of the parties pursuant to Rule 42(2) of this Court. The brief is in support of the position of the petitioner, the Secretary of Agriculture.

The American Stock Yards Association is a voluntary association organized in 1932, having as members 39 terminal stockyard companies regulated by the Secretary of Agriculture under the Packers and Stockyards Act, 1921 (42 Stat. 159, 7 U.S.C. § 181, et seq.), as follows:

Belt Rail Road and Stock Yards Company (Indianapolis Stock Yards), Indianapolis, Indiana
Bourbon Stock Yard Company, Inc., Louisville, Kentucky
The Buffalo Stock Yards, East Buffalo, New York
The Cincinnati Union Stock Yard Company, Cincinnati, Ohio
The Cleveland Union Stock Yards Company, Cleveland, Ohio
The Denver Union Stock Yard Company, Denver, Colorado
Detroit Stock Yards, Detroit, Michigan
The Evansville Union Stock Yards Co., Inc., Evansville, Indiana
Fort Worth Stockyards, Fort Worth, Texas
Jersey City Stock Yards, Inc., Jersey City, New Jersey
Joplin Stockyards Inc., Joplin, Missouri
Kansas City Stock Yards Company, Kansas City, Missouri
Los Angeles Union Stockyards Company, Los Angeles, California
Milwaukee Stockyards, Milwaukee, Wisconsin
Mississippi Valley Stockyards, St. Louis, Missouri
The Ogden Union Stockyards Company, Ogden, Utah
Oklahoma National Stock Ya ls Co., Oklahoma City, Oklahoma
Old Union Stockyards Co., Spokane, Washington
The Peoria Union Stock Yards Co., Inc., Peoria, Illinois
Port City Stockyards Co., Inc., Houston, Texas

Portland Union Stock Yards Company, North Portland, Oregon
Salt Lake Union Stock Yards, North Salt Lake, Utah
Sioux City Stock Yards Company, Sioux City, Iowa
Sioux Falls Stock Yards Company, Sioux Falls, South Dakota
South Memphis Stock Yards Co., Memphis, Tennessee
South San Francisco Union Stockyards, South San Francisco, California
Springfield Stockyards Co., Springfield, Illinois
Stockton Union Stockyards, Stockton, California
St. Joseph Stock Yards Co., South St. Joseph, Missouri
St. Louis National Stockyards Co., National Stock Yards, Illinois
St. Paul Union Stockyards Company, South St. Paul, Minnesota
Union Stock Yards Co., Dayton, Ohio
Union Stock Yard Co., Lancaster, Pennsylvania
Union Stock Yard & Market Co., New York, New York
Union Stock Yard Company of Baltimore County, Maryland, Baltimore, Maryland
Union Stockyards Company of Fargo, West Fargo, North Dakota
Union Stock Yards Company of Omaha (Ltd.), Omaha, Nebraska
Union Stock Yards San Antonio, Inc., San Antonio, Texas
The Wichita Union Stock Yards Company, Wichita, Kansas

The member companies have authorized and directed the Association to file this brief as their representative and on their behalf.

STATEMENT OF INTEREST OF THE AMERICAN STOCK YARDS ASSOCIATION

The Denver Union Stock Yard Company regulation here in controversy is not an isolated phenomenon. It is part of a long-standing pattern throughout the stockyard industry. The member companies of the Association have established and are enforcing numerous regulations that enable patrons of the public market at the stockyards to receive the stockyard services to which they are entitled by law, both from the companies and from the market agencies that are permitted to conduct their business at the yards and act in a fiduciary capacity in buying and selling livestock for the patrons of the yards.

Unless the decision of the Court of Appeals is reversed, the regulations of the members of the Association and other stockyard companies may be nullified by the courts, and the Secretary of Agriculture compelled to nullify them, on records (a) completely devoid of evidence as to any unreasonableness of the regulations or as to any failure of the regulations to conform to the public interest, and (b) without any initial determination as to unreasonableness and findings thereon by the Secretary in the exercise of his primary jurisdiction under title III of the Act.

The regulatory plan provided by Congress would be upset if the Secretary were required to determine the reasonableness of important industry regulations, and pass on their validity, without the evidentiary hearing the Act has heretofore been held to require. The stockyard companies could not effectively function in carrying out their obligation as a public utility to see to it that reasonable stockyard services are furnished the patrons.

SUMMARY OF ARGUMENT

The Court of Appeals' decision ignores and upsets the statutory plan that Congress has provided in the Packers and Stockyards Act, 1921, for determining the reasonableness of regulations of a public stockyard company. The plan provided by the Act was taken by Congress directly from that which it had previously provided for railroads under the Interstate Commerce Act. It is the plan customarily used in the field of common carriers and public utilities. Congress has applied it not only to railroads and stockyard companies but also to motor carriers, air carriers, water carriers in domestic commerce, freight forwarders, carriers by wire or radio, natural gas companies, intercoastal water carriers, and water carriers in foreign commerce.

The statutory plan recognizes that a common carrier or public utility company has initial authority at common law to prescribe regulations for the conduct of its business. The regulations must be reasonable and the burden is on him who attacks, to show that a regulation is unreasonable. By statute, Congress provides that any such attack shall, in the first instance, be made before an administrative agency, not the courts, and that the agency may not hold the regulation invalid unless there has been an administrative hearing (which this Court has said shall be an evidentiary hearing) and findings and an order based thereon. If the administrative agency finds a company regulation invalid in any particular, it may then prescribe the reasonable regulation thereafter to be observed.

A public stockyard company has the duty to furnish reasonable stockyard services to farmers and

other patrons. If a farmer chooses not to handle the sale of his own livestock at the stockyard, then the stockyard company has the duty to furnish him services for the sale of his livestock on a commission basis. The stockyard company may do this through its own employees or other instrumentalities. In practice it furnishes such services through affording free to a limited number of market agencies (commission firms) the privilege of doing business at the yards. Such commission firms are instrumentalities, not patrons, of the stockyard company.

The situation is analogous to that of railroads that have, for instance, the duty to furnish the public express and sleeping car services. Under the decisions of this Court a railroad may, if it so determines, furnish such services through one or more corporate instrumentalities, such as express companies and sleeping car companies, but without permission of the railroad, those instrumentalities have no right to conduct their business on the railroad. As this Court has said, a railroad is not a common carrier of express or sleeping car companies.

The contested regulation of the stockyard company imposes restrictions on commission firms that have been given the privilege of selling consigned livestock at the stockyard on a commission basis. That privilege has long been subject by regulations of various stockyard companies to numerous conditions. These conditions are designed to see to it that the farmer receives reasonable services and to protect the status of the stockyard as an adequate mechanism for establishing accurate livestock prices. Many of these regulations (see Appendix to this Brief) relate to the solicitation and diversion of livestock by commission firms

for or to other markets, particularly to private markets where there is no competitive bidding and where practices of commission firms are not subject to regulation by the Secretary of Agriculture.

Respondent commission firm complained, before the Secretary of Agriculture, of the unreasonableness of such a regulation. However, it refused to place of record any evidence that the regulation was unreasonable or to participate in a hearing on that issue. Having in mind the statutory prohibition against holding a company regulation invalid unless there has first been an evidentiary hearing, and findings and an order based thereon, the Secretary held, through his Judicial Officer, that on a record void of all evidence as to unreasonableness, he could not find the regulation invalid on its face. The Secretary, therefore, dismissed the complaint.

Nevertheless, on appeal from the Secretary, the Court of Appeals held the company regulation invalid on its face and directed the Secretary to issue a cease and desist order against enforcement of the regulation. The lower court did this despite genuine, material issues of fact raised by the pleadings. In so doing, the lower court denied the stockyard company the evidentiary hearing that the stockyard company demanded and that the Act requires before a company regulation may be held invalid. The lower court ignored the primary jurisdiction of the Secretary under the Act to determine the question of unreasonableness. It denied the Secretary his statutory authority, if he finds a company regulation unreasonable in any particular, to prescribe the just, reasonable and non-discriminatory regulation thereafter to be observed.

An evidentiary hearing would have afforded an opportunity by the company to pre evidence as to the reasonableness of the regulation and its relationship to the Congressional policy embodied in the Act. In the absence of such a hearing, and findings and order thereon, the Court of Appeals has no authority to hold the regulation invalid "on its face" or on the basis of facts not of record but conjectured by the court. The court has no authority to dispense with the statutory plan.

ARGUMENT

The regulation in controversy of the Denver Union Stock Yard Company applies to market agencies (commission firms) granted permission by the company to buy and sell livestock at the yard on commission and for the account of patrons of the yard; also to dealers granted permission by the company to buy and sell livestock at the yard for their own account. The regulation is designed to prevent market agencies and dealers from engaging in practices that impair the quality of the stockyard services received by patrons of the yard. Thus the regulation prohibits the market agencies and dealers from soliciting business for other markets, for sale at outside feed yards or country points, from endeavoring to secure customers to sell or purchase livestock off the Denver yard, and from diverting from the Denver yard the normal flow of livestock to it. The text of the regulation appears in the Appendix to this Brief at pages 6a-7a. The regulation in no wise restricts farmers and stockmen as to the stockyard or other place where they may choose to sell their livestock.

Commission firms are one of the instruments through which a public stockyard may function. They are not, themselves, patrons of the yard. They serve the

patrons of the yard, the farmers or other shippers who send livestock to the yard. They serve as agents in a fiduciary capacity and occupy a position of trust.

Commission firms are vital to the pricing mechanism of the yard. Their activities are of utmost importance in establishing the level of prices for livestock. Their activities affect the reputation of the yard and its good will. Commission firms have a duty to refrain from activities that impair the service rendered patrons of the yard.

The record does not contain any evidentiary facts as to what is the effect of the regulation. Respondent, Producers Livestock Marketing Association, while complaining (R. 40) that the contested stockyard company regulation is "unjust, unreasonable, and discriminatory", elected (R. 72) not to place in the record any facts showing that the regulation is unjust, unreasonable, or discriminatory in its effect. Respondent elected to rely solely on the "face" of the regulation. It filed before the Secretary of Agriculture an "Election to Rest" (R. 72) in which it stated:

> "that the challenged regulation . . . is illegal and invalid upon its face as a matter of law, that this complainant elects to stand upon the illegality of said regulation, as a matter of law, and states that it will not present evidence in this cause, as the taking of evidence is unnecessary to determine illegality of said regulation as a matter of law.
>
> Wherefore the complainant hereby rests and submits its case for final decision by the Secretary of Agriculture."

As a result of this action, the Producers Livestock Marketing Association presented in the record no facts

relating to the unreasonableness of the regulation, notwithstanding that this Court has stated that "unreasonableness" is not made out by mere assertion, but is a question of relation and degree demanding close scrutiny of the facts. *Swift & Co.* v. *United States*, 343 U.S. 373, 383 (1952); *Sugar Institute* v. *United States*, 297 U.S. 553, 600 (1936).

Respondent's action also had the effect of preventing any evidentiary hearing (R. 73). It insisted that no hearing was required and refused to attend the hearing set.[1]

Under these circumstances created by respondent the Secretary held that "upon the limited record before us we cannot find that the contested regulation of the respondent is invalid upon its face" (R. 32) and dismissed the complaint. The Secretary thereby preserved the right of the stockyard company to an evidentiary hearing before the regulation was held invalid. The action of the Court of Appeals in holding the regulation invalid on its face and directing the Secretary to annul it without an evidentiary hearing, shows misunderstanding of the legal status of stockyard company regulations and of the statutory plan for reviewing them.

---

[1] The docket file before the Secretary of Agriculture (P&S Docket No. 2176) which is a public record, shows that at the same time respondent by letter transmitting the "Election to Rest" stated that—

> "This, of course, will mean that no hearing will be required on January 24, 1956, *or at any other time*" (emphasis supplied). See R. 35, item (26).

I. The Buying and Selling of Livestock by Commission Firms Is a Privilege That May Be Restricted By Reasonable Regulations of a Stockyard Company.

A. Under the Regulatory Plan a Stockyard Company Has Primary and Initial Authority to Adopt Reasonable Regulations for the Conduct of Its Business.

The regulatory plan provided by Congress in Title III of the Packers and Stockyards Act, 1921, is that customary in the field of public utilities and common carriers. The plan is that applied by Congress to regulations adopted by railroad companies for the conduct of their business (34 Stat. 589, 36 Stat. 544, as am., 49 USC §§ 1(6) and 15(1)), and also to regulations of motor carriers (49 Stat. 558, 49 USC § 316), air carriers (52 Stat. 992, 1018, 49 USC §§ 483, 642), freight forwarders (56 Stat. 286, 288, 49 USC §§ 1004, 1006), carriers by wire or radio (48 Stat. 1070, 1072, as am., 47 USC §§ 201, 205), natural gas companies (52 Stat. 822, 823, 15 USC §§ 717c, 717d), and common carriers by water in domestic commerce (54 Stat. 934, 937, 49 USC §§ 905, 907), in intercoastal commerce (52 Stat. 964, 46 USC § 845a), and in foreign commerce (39 Stat. 734, 735, as am., 46 USC §§ 816, 817). The decision of the Court of Appeals, if applied to regulations of public utility and common carriers in these fields, would have equally vitiating effects.

Specifically Congress, in the case of stockyards, followed the regulatory plan for railroads as then in effect under the Interstate Commerce Act. In its report on the bill the Committee on Agriculture, House of Representatives, said, with respect to the stockyards title of the Act (H. Rept. 77, 67th Cong., 1st sess., p. 10)—

> "The procedure and language are modeled very closely on the interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services."

This Court, in *Tagg Brothers and Moorhead* v. *United States* (280 U.S. 420, 435 fn. 3 (1930)), recognized that the regulatory plan under the stockyards title of the Act follows that for railroads under the Interstate Commerce Act. See also, *Sullivan* v. *Union Stockyards Co.*, 26 F. 2d 60, 61 (C.A. 8, 1928).

Under such plan of regulation the public utility or common carrier has primary and initial authority to establish, observe, and enforce regulations governing the furnishing of its services. *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913); *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 326 (1945); *Lichten* v. *Eastern Airlines*, 189 F.2d 939 (C.A. 2, 1951); *Houfburg* v. *Kansas City Stock Yards Company*, 283 S.W. 2d 539, 544 (Mo., 1955). Such regulations are required to be just, reasonable, and non-discriminatory. This limitation of the common law was, in the case of public stockyards, declared by Congress in § 307 of the Act. That section was taken directly from § 1(6) of the Interstate Commerce Act. The regulations of the public utility or common carrier are presumptively reasonable. The burden is on the complainant to prove unreasonableness by competent evidence.

These principles are well stated by the Court of Appeals for the Eighth Circuit in *Platt* v. *Lecocq*, 158 F. 723, 730-731 (1907)—

> "A common carrier has the right to conduct its business in its own way in accordance with the rules of the common and statutory law . . . It has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods, and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumably right and reasonable. The burden is on him who assail them to prove that they are unfair and unjust, and it is only when it appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them."

The reasonableness of a public utility or common carrier regulation, including that of a stockyard company, was always subject to judicial determination. Legislation modified this scheme by interposing a primary jurisdiction in an administrative agency to determine reasonableness of company regulations upon complaint or upon the agency's own initiative. In the case of the railroads this was provided by § 15(1) of the Interstate Commerce Act which was the source of its counterpart in § 310 of the Packers and Stockyards Act. The administrative agency could hold a regulation unreasonable only after "full hearing". The primary jurisdiction of the administrative agency was recognized by this Court in *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and the primary jurisdiction doctrine there announced has been subsequently followed by this Court and applied to stockyards in *United States* v. *Morgan*, 307 U.S. 183, 190-191 (1939). Also this Court has defined the "full hearing" requisite as being

a requirement for an evidentiary hearing. Thus in *Interstate Commerce Commission* v. *Louisville and Nashville Ry. Co.*, 227 U.S. 88, 91, 92 (1913) this Court said—

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved . . .
>
> Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order."

If, after a full evidentiary hearing, the administrative agency finds that a company regulation is unreasonable, then it is authorized to determine and prescribe the just, reasonable, and non-discriminatory regulation to be thereafter followed by the public utility or common carrier and to order the company to conform to the regulation so prescribed. In the case of stockyards this is set forth in § 310 of the Act taken from § 15(1) of the Interstate Commerce Act.

This regulatory plan applies to the rates, charges, and practices, as well as to regulations, of the public utility or common carrier.

It is this regulatory plan customary in the field of public utilities and common carriers that the Court

of Appeals has upset. It has done so by ignoring the primary jurisdiction of the Secretary of Agriculture to determine unreasonableness of a regulation and to hold the regulation invalid, in whole or in part, only after full evidentiary hearing; also by directing the Secretary (R. 84) to enter a cease and desist order nullifying the regulation without the Secretary's first having exercised his primary jurisdiction to determine and prescribe what would be the just, reasonable, and non-discriminatory regulation thereafter to be followed.

In addition to the Secretary's power to review and determine the reasonableness of a particular regulation of a particular stockyard company, the Secretary has the authority to adopt his own regulations of general applicability to carry out the provisions of the Act (§ 407). These regulations of the Secretary are to be found in 9 C.F.R. Pt. 201. There is no question here of any conflict between the contested regulation of the Denver Union Stock Yard Company and the general regulations of the Secretary. Indeed, the Secretary's regulations, themselves, provide that a market agency shall not enter into any agreement, relationship, or association with buyers which might have a tendency to lessen the loyalty of the market agency to its consignors or impair the quality of the market agency's selling services. 9 C.F.R. § 201.61(a). Moreover, the Secretary's regulations (9 C.F.R. § 201.4) state that they shall not prevent the legitimate application or enforcement of any valid regulation of a stockyard owner.

B. Regulations of a Stockyard Company May Provide the Method Through Which the Service of Buying or Selling Livestock on a Commission Basis is Furnished.

A stockyard is a facility conducted as a public market at which livestock are received, held, or kept for sale or shipment. Act, § 302(a). The services to be rendered by a stockyard company are numerous (Act § 301(b), 9 C.F.R. § 201.17) and they include services in connection with the buying or selling of livestock on a commission basis. Act, § 301(b). The stockyard company may furnish the numerous services required of it as a public utility through its own employees or arrangements with others. The service of buying and selling on a commission basis, however, is commonly furnished through arrangements with a limited number of commission firms (market agencies) that are given the "privileges of the market" by the stockyard company.

The relationship of a stockyard company and the commission firm is similar in many respects to that of a railroad company and express company. In *The Express Cases*, 117 U.S. 1 (1886) this Court held that the railroad has a duty to furnish the public reasonable express service but that it owes no duty to the public as to the particular agencies it may select for that purpose. It may furnish the service through its own employees or select one or more express companies whose employees will furnish the service. The railroad is not a "common carrier" of express companies. They have no right to use the facilities of a railroad.

The situation is the same as to the duty of the railroad to furnish drawing room and sleeping car service. The railroad may use the instrumentality of another

corporation and employ it in order that the railroad may properly discharge its duty to the public. By using such an instrumentality, the railroad does not abandon the duty it owes the public. *Chicago, St. Louis, and New Orleans R. Co.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 89-90 (1891).

So here the stockyard company has a duty to furnish services for buying and selling livestock on a commission basis. It may perform this duty through instrumentalities such as commission firms. The stockyard company need not make use of commission firms but if it does use such firms, the stockyard company does not thereby relieve itself of its duty to see to it that reasonable services are furnished the livestock farmers and shippers. The contested regulation was adopted pursuant to that duty.

See also, *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279, 295-296 (1905); *United States* v. *Fruit Growers Express Co.*, 279 U.S. 363, 368 (1929).

C. Under Stockyard Company Regulations Buying and Selling Livestock at a Stockyard by Commission Firms is a Privilege.

Farmers have a right to buy and sell livestock at any public stockyard without the assistance of a market agency (commission firm). Most stockyard company tariff[1] regulations specify this right. Thus the Denver Union Stock Yard Company provides in paragraph 3(c) of its tariff regulations that—

> "Any owner may handle, offer for sale, and sell livestock upon this Market without the assist-

[1] Tariff provisions cited herein by location of the stockyard and number of the tariff, are set forth in the Appendix to this Brief.

ance of a market agency, and will be furnished without discrimination reasonable facilities and services."

A similar provision with respect to owners and shippers of livestock will be found in the tariff regulations of other yards.[2] The stockyard company has, as its fundamental duty, service to the farmer.

On the other hand, the buying and selling of livestock by market agencies on a commission basis for the account of owners is a privilege. Thus the Denver Union Stock Yard Company states in regulation 1(b) of its tariff that—

> "This Company offers to grant to persons (which term includes individuals, partnerships, corporations, or associations) the privilege of selling, buying, or trading in livestock at this Market, or otherwise of engaging in appropriate business at this Stockyard, subject to the rates, charges and regulations of this Company published and filed with the Secretary of Agriculture, the provisions of the Act, and the applicable regulations of the Secretary of Agriculture, and these and any other regulations, rules, or practices of this Company established for the conduct and operation of this Stockyard."

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[2] Baltimore No. 11, Reg. 3; Buffalo No. 11, Reg. 2; Cincinnati No. 12, Reg. 12; Cleveland No. 8, Reg. 1(b); Detroit No. 12, Reg. 2; Evansville No. 11, Reg. 1(b); Fort Worth No. 7, Reg. 3; Indianapolis No. 8, Reg. 1(A); Kansas City No. 12, Reg. 4; Los Angeles No. 16, Reg. 3(c); Louisville No. 17, Reg. 1(b); Salt Lake City No. 8, Reg. 2; Ogden No. 12, Reg. 13; Omaha No. 18, Reg. 1; Peoria No. 11, Reg. 5; Portland No. 19, Reg. 6; St. Joseph No. 19, Reg. 2; St. Paul No. 26, Reg. 3(a); San Antonio No. 13, Reg. 3(c); Sioux City No. 16, Reg. 5; Sioux Falls No. 12, Reg. 5; Milwaukee No. 3, Reg. 5; Fargo No. 8, Reg. 3(a); Wichita No. 13, Reg. (B).

and in regulation 4(b)—

> "No person will be permitted to engage in the business of selling or buying livestock on a commission basis or furnishing stockyard services as a market agency without the express permission of this company."

The tariffs of the Los Angeles Union Stockyards Company[3] and the Union Stock Yards San Antonio[4] have substantially similar provisions.

Most other terminal stockyards in their tariff regulations also describe buying and selling livestock at the stockyard by commission men in terms of privilege. Thus some require a "license" from the stockyard owner.[5] Other tariffs require the permission and approval of the stockyard owner.[6] Still others require or may require, an "agreement" or a "contract" with the stockyard owner.[7] Some merely refer to the "privileges".[8]

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[3] Tariff No. 16, Regs. 1(b), 4(b), and 5(b).

[4] Tariff No. 13, Regs. 2(b), 4(b), and 5(b).

[5] Cleveland No. 8, Reg. 2; Evansville No. 11, Reg. 2; Indianapolis No. 8, Reg. 2; Louisville No. 17, Reg. 2(1).

[6] Salt Lake City No. 8, Reg. 1; Ogden No. 12, Reg. 1; St. Joseph No. 19, Reg. 10.

[7] Baltimore No. 11, Reg. 1; Buffalo No. 11, Reg. 1; Detroit No. 12, Reg. 1; Fort Worth No. 7, Reg. 1; Kansas City No. 12, Reg. 8; Portland No. 19, Reg. 1; Sioux City No. 16, Reg. 8(a); Sioux Falls No. 12, Reg. 8(a); St. Paul No. 26, Reg. 15; San Francisco No. 8, Reg. 8; Milwaukee No. 3, Reg. 10; Fargo No. 8, Reg. 15; Stockton No. 6, Reg. 1; Wichita No. 13, Reg. (A).

[8] Buffalo No. 11; Cincinnati No. 12, Reg. 13; Denver No. 14, Regs. 1(b) and 4; Detroit No. 12, Reg. 12; Fort Worth No. 7; Kansas City No. 12, Regs. 2 and 9; Los Angeles No. 16, Regs. 1(b) and 4; Milwaukee No. 3, Reg. 9; Portland No. 19, Reg. 10; St. Louis (National) No. 9, Reg. XV; St. Louis (Mississippi Valley) No. 8, Reg. 1; San Antonio No. 13, Regs. 2(b) and 4(h).

Whatever form the "license" of the commission firm to conduct its business at the stockyards takes, in all instances the permission of the stockyard owner in some form is required. The fact that the Act (§ 303) and the Secretary's own regulations (9 C.F.R. § 201.10) require registration of market agencies and dealers does not make it mandatory that the stockyard owner under all circumstances grant permission to a market agency or dealer to do business at the stockyard. The Secretary himself, through his Judicial Officer, has held (*Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597 (1950)) that—

> "Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business."

The Secretary has stated in his own regulations (9 C.F.R. § 201.79(b)) that assignments of pens and facilities for market agencies shall be made—

> ". . . on the basis of the availability of pens and facilities, the need of the registrant for such assignment, volume and kind of livestock handled, the number, size, character, and kind of consignments received or lots purchased, the seniority of the market agency . . ., the operating conditions of the stockyard, and other pertinent considerations: *Provided,* That no assignment, adjustment, or change shall unfairly or unjustly discriminate against any market agency . . . or impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market."

D. The Privilege Has Been Subjected to Numerous Varying Limitations by Stockyard Company Regulations, Including Limitations Relating to Interference With the Normal Flow of Livestock.

Regulations of various stockyard companies provide that the company will deny or revoke the privileges of the market (a) to market agencies in excess of a reasonable number sufficient to care efficiently for all livestock coming to the market, or if additional pen and other facilities are not available, or (b) to those that engage in dishonest or fraudulent practices or violate provisions of the Act or regulations of the Secretary or the company, or (c) to those who tamper with locks, gates, or doors of pens or buildings or abuse or destroy company property, or (d) to those who do not have qualifications necessary to perform the marketing services, or (e) to those who do not have the ability to fulfill their financial obligations.

The market agency is required as a condition of the privilege to give a bond conditioned on observing regulations and collecting and paying over to the company all freight, feed, and service charges due the company on livestock handled by the market agency.

Conditions vary greatly at different stockyards calling for different limitations on those engaging in business at the yards. Some stockyards are local in nature; others are terminal yards drawing livestock from more distant areas. Some yards serve farmers primarily; others, country dealers and feed lots. Some serve nearby packers; others are primarily shipping markets and most of the livestock goes forward to other destinations. The facilities and services of the stockyard owners and the practices of the market agencies differ at different yards and require different

regulations. Only a full evidentiary hearing would reveal the factual situation at a particular yard.

Many stockyards face the problem of diversion of the normal flow of livestock to the yard. Such diversion takes different forms. The privilege of a market agency to do business at a stockyard has long been conditioned by various regulations relating to interference with the flow of livestock. Regulation 10(c) of the Denver Union Stock Yard Company is not unique, but fits into the developing pattern of regulating various aspects of the problem.

One of these aspects is the duty a stockyard company owes to the farmer or shipper to see to it that his consignments to a particular commission firm are respected and not interfered with. In consequence, nearly all stockyard companies provide by regulation that a market agency may not divert consignments of livestock by (a) soliciting or otherwise interfering with owners, drivers, or attendants, of incoming trucks or driven-in livestock in streets adjacent to or upon company property; or (b) soliciting or otherwise attempting to cause reconsignment of livestock already consigned to any market agency or dealer doing business on the market.[9]

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[9] Baltimore No. 11, Reg. 6; Buffalo No. 11, Reg. 4; Cincinnati No. 12, Reg. 10; Cleveland No. 8, Reg. 9; Denver No. 14, Reg. 10(a) and (b); Detroit No. 12, Reg. 4; Evansville No. 11, Reg. 12; Fort Worth No. 7, Reg. 9; Indianapolis No. 8, Reg. 10; Kansas City No. 12, Reg. 14; Los Angeles No. 16, Reg. 10(a) and (b); Stockton No. 6, Reg. 8; Ogden No. 12, Reg. 10; Omaha No. 18, Reg. 4; Peoria No. 11, Reg. 3; Portland No. 19, Reg. 9; Salt Lake City No. 8, Reg. 8; San Antonio No. 13, Reg. 10(a) and (b); Sioux City No. 16, Reg. 9; Sioux Falls No. 12, Reg. 9; St. Paul No. 26, Reg. 8; San Francisco No. 8, Reg. 9; Milwaukee No. 3, Reg. 8; Fargo No. 8, Reg. 8; Wichita No. 13, Reg. C; Stockton No. 6, Reg. 8.

Other regulations prohibit a market agency or dealer from (a) buying, selling, or trading in livestock at a stockyard until the livestock has been delivered to the consignee, or (b) without their permission entering a pen in which sellers and buyers are trading on any livestock contained therein, or (c) trading outside of regular market hours.[10] Some regulations prohibit market agencies and dealers from soliciting, at or near the yards, business for other markets, for sale at outside feed yards, or at country points, or to secure customers to sell or purchase livestock elsewhere, or from diverting or interfering with the normal flow of livestock to the yard.[11] All these regulations have one objective, seeing to it that reasonable stockyard services are rendered to patrons of the yard. The Secretary, himself, adopted in 1954 a regulation providing that no market agency shall solicit consignments of livestock (a) at or on livestock premises, or (b) in designated areas, or (c) after such livestock have been billed or consigned to a market agency and are in course of transportation for delivery to the consignee at a posted stockyard or in a designated area (9 C.F.R. § 201.63).

As marketing conditions have changed, so have diversion regulations been modified to meet them. The Denver regulation is not unique. Los Angeles,[12] San Antonio,[13] and Baltimore,[14] have similar regulations.

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[10] Denver No. 14, Reg. 10(b); San Antonio No. 13; Reg. 10(b).

[11] Houston No. 4, Supp. 14, Reg. 13(7); Kansas City No. 12, Reg. 10; Ogden No. 12, Reg. 11.

[12] Tariff No. 16, Reg. 10(c).

[13] Tariff No. 13, Reg. 10(c).

[14] Tariff No. 11, Supplement 13, Reg. 14.

Stockton has a somewhat similar requirement in its contract with a market agency.[15]

II. An Evidentiary Hearing Would Have Shown That The Contested Regulation is in Furtherance of the Policy of Congress.

When the Packers and Stockyard Act was passed in 1921, the relatively few livestock markets were nearly all large terminal markets. H. Rept. 1048, 85th Cong., 1st sess., p. 3. Over 90 percent of livestock purchases by packers were made at these terminal markets, less than 10 percent being purchased in the country. Federal Trade Commission Report on the Meat Packing Industry (1918), Pt. 3, p. 110. There are now about 66 of these terminal markets.

Since 1921 the auction livestock markets have developed so that there are now around 2400 of them. Gerald Engleman, The American Livestock Auction Market, published by United States Department of Agriculture, 1956, p. 3.

These terminal and auction markets are public livestock markets. Livestock is sold at these markets on the basis of competitive bidding or auctions.

The Committee on Agriculture, House of Representatives, recently stated (H. Rept. 1048, 85th Cong., 1st sess., p. 3)—

> "Equally significant is the growth which has taken place in country buying—buying by packers or by livestock dealers direct from the producer, without the animals going through a public stockyard or market. There was little or no such buying at the time the Packers and Stockyards Act became law but it is today a common practice in

[15] Tariff No. 6, Reg. 1(A)(b) and Reg. 8. Kansas City has a regulation directed to the same end, Tariff No. 12, Reg. 9.

almost every part of the country and more than 40 percent of all livestock sold moves in this manner."

Thus today 40 percent of the sales of livestock occur at the farm or at country livestock markets variously called concentration yards, country stations, country points, outside feed yards, or assembly points. These are private livestock markets. Livestock is not sold at these markets on the basis of competitive bidding or auctions. They are not competitive markets. Federal Trade Commission Report on Meat Packing Industry (1918), Pt. 3, p. 110.

The Act was passed by Congress largely to remedy evils found by the Federal Trade Commission as the result of its investigation of the food industry directed by President Wilson in 1917. H. Rept. 1297, 66th Cong., 3d sess., p. 23. The Commission had emphasized the need for assuring producers "of a fair market, reasonable charges, open bidding, full and helpful market information, the limitation of violent fluctuations in price, and the elimination of unnatural market influences". H. Doc. 1297, 65 Cong., 2d sess., p. 48. Impairment by a commission firm of the normal flow of livestock to a public livestock market and diversion to a private market at which there is no competitive bidding or no regulation by the Secretary, produces consequences contrary to the Congressional policy embodied in the Act. As a result of respondent's own action the record is bare of evidence as to these consequences and their relationship to the Congressional policy. A full evidentiary hearing would have afforded an opportunity to make of record facts showing that the contested regulation is in furtherance of Congressional policy.

Thus central markets are basic to price formation and accurate valuation is important. Marketing, Yearbook of Agriculture 1954, United States Department of Agriculture, pp. 49-50.

> "Price determination is . . . accomplished most effectively and most satisfactorily in a truly competitive and open market. . . . The public terminal livestock market—a really competitive market—renders an outstanding service in its method of price determination. First, because its livestock prices are arrived at by bargaining between buyers and the commission salesmen. Second, because only on the public terminal market is the stockman served by experienced salesmen, working solely in the stockman's interest." Prof. R. C. Ashby, Essentials of Livestock Marketing, Department of Livestock Marketing, Morningside College (1953), pp. 24-25.

A terminal livestock market, to adequately perform its functions, must have a large supply of all qualities of livestock, a large number of buyers, and a large amount of buying. Reduction in number of transactions through diversion affects the adequacy of the market as a pricing mechanism. See, Stewart H. Fowler, The Marketing of Livestock and Meat (1957), pp. 219, 184. Accuracy of pricing at terminal stockyards is in the public interest. The Secretary, himself, has pointed out the necessity for effectively preventing or uncovering "many important restrictive, discriminatory or monopolistic practices at points away from public stockyards affecting the prices to be paid at public stockyards". S. Rept. 704, 85th Cong., 1st sess., pp. 22-23.

At the Denver yard, respondent must bid for the purchase and sale of livestock in competition with other market agencies on that yard. To the extent

that respondent can divert transactions to private concentration yards at country points where respondent alleges it operates (R. 40), it does not have to sell under competitive bidding conditions or in competition with other market agencies. There is elimination of competition.

Further, to the extent that respondent diverts the normal flow of livestock to "unposted" markets, buying and selling occurs at markets where practices are unregulated by the Secretary.

Of the 66 terminal stockyards, all are "posted" and therefore regulated under the Act by the Secretary of Agriculture. Of the auction livestock markets 439 are posted and it is estimated 500 more are eligible for posting and regulation by the Secretary. H. Rept. 1048, 85th Cong., 1st sess., p. 3.

There are, however, an additional 1400 or 1500 public livestock markets, either auction markets or small stockyards, which are not regulated by the Secretary nor eligible for posting and regulation, because of the size limitation in section 302(a) of the Act. H. Rept. 1048, 85th Cong., 1st sess., p. 3. Neither is the large, but unknown, number of private concentration yards (see, Stewart Fowler, The Marketing of Livestock and Meat (1957), pp. 294-300) subject to regulation by the Secretary. At unregulated yards producers lose the protection of the Act except where the transaction at the unregulated yard originated at a regulated yard. *Woerth* v. *United States,* 231 F. 2d 822 (C.A. 8, 1956).

The Secretary's regulations protect producers in various ways at "posted", i.e., regulated, stockyards. Market agencies (commission firms) are required to

be registered and to have a bond conditioned on prompt accounting and payment to owners of the proceeds of the purchase price. 9 C.F.R. §§201.10 and 201.31(a). A market agency may not use shippers' proceeds for its own purposes prior to payment over to the shipper. 9 C.F.R. § 201.40. Such agencies are required to keep records and to make them available for inspection by owners of livestock. 9 C.F.R. §201.43, §201.45. Market-agencies may not sell or dispose of consigned livestock to any person in whose business the market agency has a financial interest or to any person who has a financial interest in the market agency, unless the nature of the relationship is disclosed, and then only if the purchaser's bid exceeds that of other bidders. 9 C.F.R. §201.47. Sales are to be made on the basis of actual weights shown on the scale ticket. 9 C.F.R. §201.55. Scales are required to be accurate and tested and scale operators to be competent. 9 C.F.R. §201.71 and §201.73. Sales are to be made to the highest bidder without inter-mingling and not conditioned on sales of other consignments. 9 C.F.R. §201.58. A market agency may not use consigned livestock to fill orders which it has received from buyers, clear or finance dealers, split commissions, employ packers or dealers, or be owned or financed by packers or dealers. 9 C.F.R. §§201.61-201.67. Reasonable care and promptness is required in yarding, feeding, watering, weighing, and handling livestock to prevent waste of feed, shrinkage, injury, death or other avoidable loss. 9 C.F.R. §201.82. There are numerous other regulations. 9 C.F.R., Pt. 201.

Many decisions of the courts attest to the occurrence of improper practices by market agencies in the purchase and sale of livestock. For recent decisions see,

for example, *Daniels* v. *United States*, 242 F.2d 39 (C.A. 7, 1957); *Cella* v. *United States*, 208 F. 2d 783 (C.A. 7, 1953); *United States* v. *Sklar*, 13 Agr. Dec. 583 (D.C. Texas, 1954), not otherwise reported; *Woerth* v. *United States*, 231 F. 2d (C.A. 8, 1956). Another example is the case in which the respondent here consented to entry of a cease and desist order by the Secretary restraining it from engaging in such practices as issuing accounts of purchase and invoices representing the weight of livestock to be more than the true weight; billing for purchased livestock at prices higher than those at which purchased; making an unsecured loan to a big packer buyer for payment on a home; agreeing to ship no fat lambs east from Ogden except to Armour, in return for Armour's placing its orders for sheep and lambs with respondent or its subsidiary; failing to assess feed charges against a dealer for whom it held livestock; recording purchases and sales as "country transactions" instead of transactions subject to the Act; purchasing employees' livestock at a price in excess of market and promptly reselling at a loss; extending credits to a company owned by certain of its officers; improper use of proceeds of sales of consigned livestock; and other practices. The Secretary found that many of the violations operated for the benefit of employees and officials at the expense of many members of respondent. In re *Producers Livestock Marketing Association and Western Livestock Order Buyers*, 14 Agr. Dec. 109 (1955).

Where such practices by market agencies occur at a regulated yard, they can be remedied by action of the Secretary, but not where they occur at an unregulated yard.

The full evidentiary hearing rejected by respondent would have afforded an opportunity to show the effect of the regulation and its relation to Congressional policy embodied in the Act. The validity of the contested regulation cannot be determined merely from its face as an abstract matter in the absence of all relevant facts. To hold, as did the Court of Appeals, that the regulation is invalid on its face, is to close one's eyes to the realities of the situation. The blindness of justice relates to judicial impartiality, not self-imposed ignorance.

III. The Judgment of the Court of Appeals Unlawfully Denies the Right of the Stockyard Company to an Evidentiary Hearing

The lower court has held the contested regulation invalid and directed the issuance of a cease and desist order against the stockyard company without there having first been an evidentiary hearing and findings and an order based thereon by the Secretary. This is beyond the power of the court.

A. There Are Genuine Material Issues of Fact.

The allegations made in the complaint with respect to the purpose and effect of the contested regulation (R. 41) may be summarized as follows: That, with respect to the designated area, market agencies (commission firms), including complainant, are forbidden (a) to sell livestock to a packer, feeder, or other outlet; (b) to purchase so as to meet competition and maintain volume for its outlets; (c) to furnish market advice to its farmer members except that they ship to and sell at the Denver yard; (d) to reconsign livestock to other stockyards in case of a glut at the Denver yard; or (e) to buy, sell, or take consignments

in the country except for movement to the Denver yard.

All these allegations were denied in the answer of the Stockyard Company (R. 45-46). Also, the answer of the Stockyard Company set out four affirmative defenses (R. 46-47). They were, in substance, that the stockyard company and market agencies at the stockyard cannot furnish, or patrons receive, reasonable stockyard services at the stockyard so long as market agencies operating there engage in the activities prohibited by the contested regulation. These activities render it impossible for the market agencies to carry out their primary duties and responsibilities at the Denver yard. The Secretary, through his Judicial Officer, stated "We are not prepared to say that nothing in the respondent's answer has a material bearing on the outcome of the proceeding" (R. 28).

Following its answer the Stockyard Company moved for the issuance by the Secretary of a subpoena directing complainant to produce for examination and copying certain books and records described and identified in the motion (R. 48-50). Respondent resisted and demanded that the regulation be held invalid on its face (R. 54-56). The hearing examiner concluded that facts must be presented to see whether the regulation, or action taken under it, is reasonable under the circumstances (R. 71). He therefore set a time for an evidentiary hearing and stated (R. 71)—

> "When complainant has presented its evidence, respondent [the stockyard company] then may move to dismiss, renew its request for a subpoena, or take whatever other action it desires. If respondent then needs the subpoena, it is my present opinion that it will be granted . . ."

Thus, faced with the probability of the issuance of a subpoena *duces tecum*, complainant thereupon filed its "Election to Rest" (R. 72). In its Election to Rest complainant asked the Secretary to dispose of the complaint through ignoring all issues of fact raised by the pleadings. Complainant stated that it would not attend an evidentiary hearing, that it would not present evidence, and that it rested and submitted its case for final decision by the Secretary (R. 72).

Complainant's Election to Rest was similar to a motion for judgment on the pleadings. Such a motion will ordinarily be denied where genuine issues of fact are present. *Friedman* v. *Washburn Co.*, 145 F. 2d 715 (C.A. 7, 1944); *Bass* v. *Hoagland*, 172 F. 2d 205 (C.A. 5, 1949). The Secretary, through his Judicial Officer, concluded that the issues made with respect to unreasonableness and the like could be decided only after the relevant and material facts are ascertained (R. 28). Consequently, on the limited record before him, he could not find the contested regulation invalid upon its face (R. 32), as asserted in the Election to Rest. Accordingly, he dismissed the complaint (R. 33). Having had no evidentiary hearing, the Secretary carefully refrained from passing on the validity of the regulation, but merely concluded that in the absence of evidence he could not hold it invalid. When complainant before the Secretary refused to submit proof of its allegations at an evidentiary hearing, the Secretary was justified in dismissing its complant.

B. The Court of Appeals Judgment Would Convert the Administrative Proceeding Into One That Denies the Stockyard Company an Evidentiary Hearing.

Despite the Secretary's conclusion that the issues as to unreasonableness of the regulation "can be decided only after the relevant and material facts are ascertained" (R. 28), the Stockyard Company, under the Court of Appeals decision, would have no opportunity to present those facts.

The Secretary left the proceeding in a posture whereby the regulation would not be held invalid without an evidentiary hearing. The Court of Appeals by its judgment would convert the proceeding into one where, despite controverted issues of fact, the Stockyard Company would never have an evidentiary hearing before the regulation has been held invalid.

Section 310 of the Act states that if "after a full hearing" the Secretary is of the opinion that a regulation of a stockyard owner is unjust, unreasonable, or discriminatory, then he may prescribe a just, reasonable, and non-discriminatory regulation and may order the stockyard owner to cease and desist from the violation and conform to the prescribed regulation. The Secretary did not violate the section for he did not determine that the regulation was unjust, unreasonable, or discriminatory. The Court of Appeals, by its decision, does force a violation since the court directs the Secretary to "enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)" (R. 84).

The first consequence of this action by the Court of Appeals is that, despite material issues of fact, the

company is denied an evidentiary hearing to which it has a right, and its regulation is held invalid without any such hearing. The second consequence of this action by the Court of Appeals is that the Court of Appeals invaded the field of administration discretion, determined that the regulation was invalid in toto as to every person and every possible application, and ignored the primary jurisdiction and duty of the Secretary to determine questions of reasonableness after findings on evidence of record. These matters are dealt with later.

The Court of Appeals attempts to vindicate its action by stating "it is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided" (R. 81). But the legal issue to be decided, as raised by the complaint and answer, was whether the regulation is "unjust, unreasonable, or discriminatory". With material issues of fact present evidence was clearly material to resolve the question of reasonableness.

The Court of Appeals also said that this Court has defined a "full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken" (R. 81). But no opportunity has been afforded the Stockyard Company to make an adequate showing by evidence, nor under the Court of Appeals decision would any such opportunity ever be afforded if that Court's mandate on its judgment goes down to the Secretary.

Finally the Court of Appeals said that, "Where no genuine or material issue of fact is presented the court

or administrative body may pass upon the issues of law after according the parties the right of argument" (R. 81). But there were genuine and material issues of fact, both those raised by the Stockyard Company's denial of the allegations of the complaint and those resulting from the Stockyard Company's affirmative allegations. Also, it might be added, there is a genuine and material issue as to the suppositious facts that the Court of Appeals imagined and assumed (R. 82) for purposes of its decision.

C. The Stockyard Company Has a Right to an Evidentiary Hearing Before Its Regulation Is Held Invalid.

The requirement in §310 of the Act that there be a "full hearing" before a determination is made that a company regulation is invalid and a cease and desist order entered, was taken by Congress directly from § 15 (1) of the Interstate Commerce Act. This Court at the time of the enactment of the Packers and Stockyards Act, 1921, had already held under the Interstate Commerce Act (*Interstate Commerce Commission* v. *Louisville and N. R. Co.*, 227 U.S. 88 (1913)) that the requirement of a full hearing confers the privilege of introducing testimony, and at the same time imposes the duty of deciding in accordance with the facts proved. This Court later reiterated that holding in *The New England Divisions Case*, 261 U.S. 184, 200 (1923). Again, under the Packers and Stockyards Act itself, this Court pointed out that the Act demands a full hearing and the order is void if such a hearing is denied; also a "full hearing" requires "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and making of an order supported by such findings . . ."

Morgan v. *United States,* 298 U.S. 468, 477-478, 480 (1936).

Here there has been no such hearing. While the Secretary has not attempted to hold the regulation invalid without such hearing, the Court of Appeals has done so, and its action is contrary to the Act and illegal. The Stockyard Company is entitled to an evidentiary hearing before the regulation, or any part of it or any particular application of it, is held invalid. The Court of Appeals may not deprive the Stockyard Company of that right.

D. The Court of Appeals Is Not Authorized to Deprive the Secretary of Agriculture of His Primary Jurisdiction in the Matter.

The Act (§310) provides that if the Secretary after full hearing is of the opinion that the existing regulation is unreasonable, he may prescribe what will be the just, reasonable, and non-discriminatory regulation and may order that the stockyard owner "conform to and observe the regulation . . . so prescribed". This requires the taking and weighing of evidence by the Secretary, findings of fact by him, and an order by him supported by his findings. *Morgan* v. *United States,* 298 U.S. 468 (1936), 304 U.S. 1 (1938).

The Court of Appeals may not hold the existing regulation invalid until the Secretary has held a full hearing, reached an opinion, and made findings on the evidence and an order based thereon. This the Secretary has not yet done. In stating that the procedure under Title III of the Packers and Stockyard Bill was modeled very closely on that of the Interstate Commerce Act, the Congressional Committee recognized the primary jurisdiction doctrine under that Act as announced by this Court in *Texas and Pacific Ry.*

Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The action of the Court of Appeals is contrary to the decisions of this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939); and *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 324 (1945). See also, *Lichten* v. *Eastern Airlines*, 189 F.2d 939, 941 (C.A. 2, 1951); and *Kelly* v. *Union Stockyards and Transit Co. of Chicago*, 190 F. 2d 860 (C.A. 7, 1951).

E. The Court of Appeals Is Not Authorized to Exercise Essentially Administrative Functions.

The contested regulation applies to dealers, as well as to market agencies (commission firms) such as Producers Livestock Marketing Association. It applies to transactions, of diverse character, including soliciting business for other markets, for sale at outside feed yards or country points, endeavoring to secure customers to sell or purchase livestock at other than the Denver yards, diverting or attempting to divert livestock from the Denver yard which would otherwise come to that yard, or engaging in any practice or device which would impair or interfere with the normal flow of livestock to the public market at the Denver yard. The normal marketing area from which livestock would normally come to the public market at the Denver yard is so defined as to include some, but not other, counties in Colorado.

Even assuming *arguendo* that the regulation is invalid in some aspect, the function of the reviewing court ends once the error of law is laid bare. The Act places in the Secretary (§310) the authority to prescribe what different regulation would be just, rea-

sonable, and non-discriminatory. When the Court of Appeals directs the Secretary to annul the entire regulation and thereby prevents the Secretary from prescribing a reasonable regulation, the Court usurps the administrative function. There doubtless are many situations where the regulation is unquestionably valid. The Court of Appeals, by its order wiping out these statutory duties of the Secretary, has assumed administrative functions and decided contrary to the decisions of this Court in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146 (1940); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-623 (1944); and *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952). The Court of Appeals has prevented any regulation by the company or the Secretary of a situation concerning which that court has no knowledge of record.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the decision of the Secretary, made through his Judicial Officer, affirmed.

Respectfully submitted,

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Attorney for American Stock Yards Association

APPENDIX

There are set forth in this Appendix provisions of stockyard company regulations cited in this Brief. The provisions appear in company tariffs or schedules on file as public documents in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D. C.

The thirty terminal stockyard companies, portions of whose regulations are cited, are all members of the American Stock Yards Association. The provisions cited and here set forth exemplify that small part of the industry regulations that relates to (1) the "privilege" of doing business as a market agency at a terminal stockyard, (2) the right of a farmer or shipper to handle his livestock at a terminal stockyard without the assistance of a market agency, and (3) the various restrictions on solicitation and diversion by a market agency.

The cited provisions follow:

Baltimore: Union Stock Yard Company of Baltimore County, Maryland, Baltimore, Md. Tariff No. 11, effective August 8, 1955, and supplement No. 13, effective February 5, 1957.

The privilege of buying, selling, and/or trading in livestock on this market shall be subject to the following rules and regulations and such other rules of the management as are necessary for the proper conduct and operations of this market.

1. No person, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at these yards until such person, firm or corporation has entered into an agreement with the Stock Yard Company to observe and obey all rules and regulations adopted by the Stock Yard Company for the government of business at its Stock Yards . . .

3. Any owner or shipper of livestock who desire to handle and sell their own stock, without the assistance of com-

mission men or dealers, will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

6. No market agency, dealer or other person, firm, corporation, or association doing business on this market shall solicit or otherwise interfere with the owners, drivers, or attendants of incoming trucks, wagons, or driven-in livestock upon the streets adjacent to or upon the property of this Company prior to delivery of such livestock to the consignee; or solicit or otherwise attempt to cause the reconsignment of any livestock already consigned to any market agency and/or dealer doing business on this market.

14. No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this stockyard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

Buffalo: The Buffalo Stock Yards, East Buffalo, N. Y. Tariff No. 11, effective March 7, 1957.

Privileges of buying, selling or trading in livestock on this market, shall be subject to the following rules and regulations and such other rules of the Management as are necessary for proper conduct and operation:

2. Owners or shippers not regularly engaged in business at the Buffalo Stock Yards, desiring to sell their own

livestock without the assistance of established commission firm, will be furnished suitable facilities to do so without furnishing bond, but subject to all rules and regulations of the Buffalo Stock Yards and at the discretion of the Buffalo Stock Yards. . . .

4. No Market agency, dealer, packer, buyer, or other person doing business on this market, shall solicit or otherwise interfere with owners, drivers, or attendants of incoming livestock upon the property of this Company, nor attempt to cause the reconsignment of livestock already consigned to a market agency on this market.

13. Any firm, corporation, or individual violating any of these rules and regulations, or detected using unfair, dishonest or fraudulent practices, or destroying, defacing or abusing property, or tampering with locks, gates, or doors of pens and buildings, may be denied the privilege of the market, excluded from the Stock Yards and treated as a Trespasser. . . .

Cincinnati: The Cincinnati Union Stock Yard Company, Cincinnati, Ohio. Tariff No. 12, effective May 1, 1956.

10. MISCELLANEOUS . . . No person shall solicit livestock consignments on the premises of the Company, or loiter on or about the unloading platforms. . . .

12. OWNERS OR SHIPPERS HANDLING THEIR OWN LIVESTOCK Owners and shippers desiring to handle and sell their own livestock without the assistance of a market agency, and agreeing to observe the rules of this Company, will be furnished service at the regular rates and such facilities as are available. . . .

13. VIOLATION OF RULES AND REGULATIONS Any person, his employees or agents, violating the rules adopted by this Company for the government of business at this Yard or using unfair, dishonest or fraudulent practices or committing illegal acts on the premises, or possessing or using keys to Company's private locks may be declared a trespasser and be denied the privileges of this Yard and dealt with accordingly.

Cleveland: The Cleveland Union Stock Yards Company, Cleveland, Ohio. Tariff No. 8, effective December 9, 1950.

The privilege of buying, selling, and/or trading in livestock on this market shall be subject to the following rules and regulations and to such other rules of the management as are reasonably necessary for the proper conduct and operation of this market:

Rule 1. OWNERS.

(b) Any owner may handle, offer for sale, and sell livestock upon this market, with or without the assistance of market agencies or dealers, and will be furnished with suitable pens and other facilities and given service equal to that furnished in connection with livestock handled and sold by market agencies, and at the same rates for feed and services. . . .

Rule 2. MARKET AGENCIES AND DEALERS.

(a) No person, firm, corporation or association will be permitted to engage in the business, as a market agency or dealer, of buying or selling, in commerce, livestock, on a commission basis or otherwise, or furnishing stockyard services, at this stockyard, without a license obtained from this Company, valid and effective at such time.

(d) Such license will be revoked by this Company whenever the licensee shall:

> (2) fail to comply with the provisions of the Packers and Stockyards Act, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this Company, or of any rule adopted or approved by this Company to govern trading on this market; or of any condition of such license.

Rule 9. SOLICITATION.

No market agency, dealer, packer, buyer, or other person doing business on this market shall solicit or otherwise interfere with the owners, drivers, or attendants of incoming truck, wagon, or driven-in livestock upon the streets adjacent to or upon the property of this Company prior

to delivery of such livestock to the consignee; or solicit or otherwise attempt to cause the reconsignment of any livestock already consigned to any market agency doing business on this market.

Rule 14. Limitation on Privilege of Market.

Any person, firm, corporation or association, or any partner, officer, agent, or employee thereof, violating any of these rules and regulations, or using unfair, dishonest, or fraudulent practices in respect to any transaction on this market, or destroying, defacing, or abusing the property of this Company, or in any manner tampering with or unlocking the locks, gates, or doors of pens or buildings, or failing or refusing, when requested in writing, to satisfy this Company that such is not being and has not been done, shall be considered a trespasser and may be denied the privilege of this market, excluded from this stockyard and dealt with as a trespasser.

Denver: The Denver Union Stock Yard Company, Denver, Colo. Tariff No. 14, effective May 25, 1955.

1. The Privilege of the Market.

(b) This Company offers to grant to persons (which term includes individuals, partnerships, corporations, or associations) the privilege of selling, buying, or trading in livestock at this Market, or otherwise of engaging in appropriate business at this Stockyard, subject to the rates, charges, and regulations of this Company published and filed with the Secretary of Agriculture, the provisions of the Act, and the applicable regulations of the Secretary of Agriculture, and these and any other regulations, rules, or practices of this Company established for the conduct and operation of this Stockyard.

3. Owners of Livestock

(c) Any owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without discrimination reasonable facilities and services. . . .

4. MARKET AGENCIES

(b) No person will be permitted to engage in the business of selling or buying livestock on a commission basis or furnishing stockyard services as a market agency at this Market without the express permission of this Company.

(h) This Company reserves the right to revoke any permission, and withdraw the privilege of engaging in the market agency business at this Stockyard, granted to any person who fails to comply with the provisions of the Act, or the regulations, rules, or orders of the Secretary of Agriculture thereunder, or the regulations, rules, and practices of this Company; . . .

10. INTERFERENCE WITH OPERATIONS

(a) No person engaging in or doing business at this Stockyard shall solicit or otherwise interfere with the owners, carriers, or attendants of incoming livestock upon the property of this Company or upon the streets or rights of way adjacent thereto, prior to delivery of such livestock to the consignee, or solicit or otherwise attempt to cause the reconsignment of any livestock consigned to any market agency engaging in business at this Stockyard.

(b) No person shall by word or action undertake to sell, buy, or trade on any livestock at this Stockyard until such livestock has been delivered to the consignee; or interrupt or interfere with any trading in progress on this Market; or, without their permission, enter any pen in which a seller and buyer are trading on any livestock contained therein; or engage, trade on, sell, or buy any livestock outside of regular market hours.

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the Public Market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it interseets the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes.

Detroit: Detroit Stock Yards, Detroit, Mich. Tariff No. 12, effective January 1, 1956.

2. Owners or shippers not regularly in business at the Detroit Stock Yards, desiring to sell their own livestock without the assistance of established commission firm, will be furnished suitable facilities to do so without furnishing bond, but subject to all rules and regulations of the Detroit Stock Yards and at the discretion of the Detroit Stock Yards. . . .

4. No market agency, dealer, packer, buyer, or other persons doing business on this market, shall solicit or otherwise interfere with owners, drivers, or attendants

of incoming livestock upon the property of this Company, nor attempt to cause the reconsignment of livestock already consigned to a market agency on this market.

12. Any firm, corporation, or individual violating any of these rules and regulations, or detected using unfair, dishonest, or fraudulent practices, or destroying, defacing or abusing property, or tampering with locks, gates or doors of pens and buildings, may be denied the privilege of the market, excluded from the Stock Yards and treated as a trespasser. . . .

Evansville: The Evansville Union Stock Yards Co., Evansville, Ind. Tariff No. 11, effective May 14, 1957.

The privilege of buying, selling, and/or trading in livestock on this market shall be subject to the following rules and regulations and to such other rules of the stockyard company as are reasonably necessary for the proper operation of the market.

Rule 1. OWNERS.

(b) Any owner may handle, offer for sale, and sell livestock upon this market, with or without the assistance of market agencies or dealers, and will be furnished with suitable pens and other facilities and given service equal to that furnished in connection with livestock handled and sold by market agencies, and at the same rates for feed and services. . . .

Rule 2. MARKET AGENCIES AND DEALERS.

1. No person, firm, corporation or association will be permitted to engage in the business as a market agency or dealer, of buying or selling, in commerce, livestock, on a commission basis or otherwise, or furnishing stockyard services, at this stockyard, without a license obtained from this Company, valid and effective at such time.

4. Such license will be revoked by this Company whenever the licensee shall:

(b) fail to comply with the provisions of the Packers and Stockyards Act, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this Company, or of any rule, adopted or approved by this Company, to govern trading on this market, or of any condition of such license.

Rule 8. Limitation on Privilege of Market.

Any person, firm, corporation or association, or any partner, officer, agent, or employee thereof, violating any of these rules and regulations, or using unfair, dishonest, or fraudulent practices in respect to any transaction on this market, or destroying, defacing, or abusing the property of this Company, or in any manner tampering with or unlocking the locks, gates or doors of pens or buildings, or fai[illegible]g or refusing, when requested in writing, to satisfy this Company that such is not being and has not been done, shall be considered a trespasser and may be denied the privilege of this market, excluded from this stockyard and dealt with as a trespasser.

Rule 12. Solicitation.

No market agency, dealer or other person, firm, corporation, or association doing business on this market shall solicit or otherwise interfere with the owners, drivers, or attendants of incoming trucks, wagons, or driven-in livestock upon the streets adjacent to or upon the property of this Company prior to delivery of such livestock to the consignee, or solicit or otherwise attempt to cause the reconsignment of any livestock already consigned to any market agency and/or dealer doing business on this market.

Fargo: Union Stockyards Company of Fargo, West Fargo, N. D. Tariff No. 8, effective July 22, 1957.

3. (a) Any owners or shippers of livestock who desire to handle and sell their own stock without the assistance of a market agency will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency,

and at the same rates for yardage, feed and service. . . .

8. No market agency, dealer or person receiving livestock at these yards shall solicit or otherwise interfere with, the owners, drivers, or attendants of incoming truck or driven-in stock upon the streets adjacent to or upon the property of this Company prior to delivery at unloading chutes.

9. Every person engaged in and doing business at this stockyards and every agent, officer, or employee of such person, shall comply with all rules, notices, warnings, and directions of this Company, including those relating to the maintenance and operation of this stockyards, the movement of livestock within the stockyards, the use of facilities, and the prevention of fire, waste of water, and other damage; no one other than authorized employees of this Company is allowed to have keys of this Company in his possession or to lock or unlock pens; and every person engaged in and doing business at this stockyards, or any officer, agent or employee thereof violating these rules or using unfair, dishonest or fraudulent practices, or destroying, defacing, or abusing the property of this Company, or tampering with or unlocking the locks, gates, or doors of pens or buildings when unauthorized to do so may be denied the privileges of these yards, treated as a trespasser and dealt with accordingly.

15. Rule for the establishment of business of buying and selling livestock in commerce or furnishing stockyards services:

(A) Except as provided in these regulations, no person, firm, corporation or association will be permitted to engage in the business as a market agency or dealer of buying or selling in commerce, livestock on a commission basis or otherwise, or furnishing stockyards services at this stockyards, without entering into a contract substantially in the form shown hereinafter, set out, with the Company for the conduct of such business. . . .

(D) Such contract will be cancelled and all privileges withdrawn and permission terminated and revoked

by this Company whenever the party to such a contract shall:

(2) fail to comply with the provisions of the Packers and Stockyards Act, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this Company, or of any rule adopted or approved by this Company to govern trading on this market.

Fort Worth: Fort Worth Stockyards, Fort Worth, Texas. Tariff No. 7, effective August 30, 1954.

The privilege of buying, selling, and/or trading in livestock on this market shall be subject to the following rules and regulations and such other rules of the management as are necessary for the proper conduct and operations of this market:

1. No person, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at these yards until such person, firm or corporation has personally entered into a written agreement with the Fort Worth Stockyards to observe and obey all rules and regulations adopted by the Fort Worth Stockyards for the government of business at its Stockyards . . .

9. No market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming truck, wagon or drive-in stock upon streets adjacent to or upon the property of the Fort Worth Stockyards prior to delivery into chutes or holding pens.

13. Any person, firm or corporation, by themselves or their employees, violating these rules and regulations or using unfair, dishonest, or fraudulent practices may be denied the privileges of these yards, treated as a trespasser and dealt with accordingly.

Houston: Port City Stockyards Co., Inc., Houston, Texas. Tariff No. 4, Supplement No. 14, effective July 15, 1957.

13. RULES (7) No market agency or dealer engaging in business at this Stockyard shall, upon Stockyards Company Property, or streets adjacent thereto or elsewhere; nor shall any other person (including packer buyers) upon Stockyards Company Property, or streets adjacent thereto:

(a) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(b) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(c) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this stockyard.

Indianapolis: Belt Rail Road and Stock Yards Company, Indianapolis, Ind. Tariff No. 8, effective October 1, 1950.

The privilege of buying, selling, and/or trading in livestock on this market shall be subject to the following rules and regulations and to such other rules of the Company as are reasonably necessary for the proper conduct and operation of this market:

Rule 2. LICENSING MARKET AGENCIES AND/OR DEALERS.

(A) No person, firm, corporation or association will be permitted to engage in the business, as a market agency and/or dealer, of buying or selling, in commerce, livestock, on a commission basis or otherwise, or furnishing stockyard services, at this stockyard, without a license obtained from this company, valid and effective at such time.

(D) Such license will be revoked by this company whenever the Licensee shall

(2) fail to comply with provisions of the Packers & Stockyards Act, 1921 as amended, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this company, or of any rule adopted or approved by this company to govern trading on this market, or of any condition of such license, .

Rule 10. SOLICITATION.

No market agency, dealer or other person, firm, corporation, or association doing business on this market shall solicit or otherwise interfere with the owners, drivers, or attendants of incoming trucks, wagons, or driven-in livestock upon the streets adjacent to or upon the property of this Company prior to delivery of such livestock to the consignee; or solicit or otherwise attempt to cause the reconsignment of any livestock already consigned to any market agency and/or dealer doing business on this market.

Market Agency and/or Dealer License

License No. .....

A License is Hereby Granted By

The Belt Rail Road and Stock Yards Company

(Hereinafter for convenience referred to as Licensor)

to .....
(hereinafter called the Licensee), to engage in business as a market agency and/or dealer, as defined in the Packers & Stock Yards Act, 1921, as amended, at the Stock Yards operated by Licensor, in Indianapolis, Indiana subject to the following conditions:

5. The Licensee shall not buy Livestock on a commission basis or otherwise outside of the Stock Yards operated by Licensor, nor shall the Licensee conduct its business in such a manner that it is in competition with the business of the public market operated by Licensor in Indianapolis, Indiana, however, this provision shall not apply to

(a) a person, firm, corporation or association regularly employed by meat packers to purchase livestock for slaughter;

(b) the bona fide purchase and/or sale of livestock for feeding, breeding or dairy purposes only.

11. The Licensor reserves the sole right to revoke this License if the Licensee violates any of its conditions, or discontinues in business as a market agency and/or dealer at its stock yards; however, before the Licensor exercises its right to revoke as aforesaid, the Licensee shall be granted a hearing before a Board composed of two (2) officers of the The Belt Rail Road And Stock Yards Company, two (2) representatives of the market agencies, one (1) representative of the Producers Commission Association, one (1) representative of the order buyers, and one (1) representative of the dealers, whose recommendations shall be submitted to the Licensor, however, after receiving said recommendation, the decision of the Licensor shall be final.

14. This license shall expire, unless sooner revoked, at midnight on the 31st day of December, 19 .....

License granted ..... 19.....

License granted by

The Belt Rail Road and Stock Yards Company

By .....

Kansas City: Kansas City Stock Yards Company, Kansas City, Mo. Tariff No. 12, effective August 23, 1954.

Rule 2. Any firm, corporation, or individual, by themselves, or their employees, violating the rules adopted by the Kansas City Stock Yards Company for the government of business at these yards, or detected using unfair, dishonest, or fraudulent practices, may be denied the privileges of the stock yards, treated as a trespasser, and dealt with accordingly.

Rule 8. No persons, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at these yards until such person, firm or corporation has entered into an agreement with this Com-

pany to observe and obey all rules and regulations adopted by this Company for the government of business at its stock yards . . .

Rule 9. No person, operating as a market agency or dealer, as the same are defined by the Packers and Stockyards Act, 1921, or as a commission agency, trader, order buyer or speculator on the Kansas City Stock Yards, shall at the same time engage in any business operations, practice or device which is competitive with the public market at Kansas City and which has or tends to have as its result or effect the destruction of, interference with, impairment of or lessening of the business carried on at such public market or the destruction, impairment or lessening of or interference with such market or the property, assets, good will or business of the Kansas City Stock Yards Company.

Nothing contained in the foregoing rule shall prohibit any person from buying, selling, or otherwise trading in live stock at some public stockyards other than the Kansas City Stock Yards.

The Kansas City Stock Yards Company reserves the right and privilege of denying any person violating this rule (No. 9) the use of the services and facilities of the Kansas City Stock Yards Company, and reserves to itself the privilege of treating any such violator as a trespasser.

Rule 10. No market agency or person, without the express permission of the Stock Yards Company, in writing, shall solicit any business in the Yards,—for other markets, —sales at outside feed yards,—or at country points,—or endeavor while on the premises of the Kansas City Stock Yards Company to secure customers to sell or purchase livestock elsewhere.

Rule 14. No person, while on the property of the Kansas City Stock Yards Company, will be permitted to solicit the purchase of, or to purchase or otherwise acquire, any live stock while the same is loaded in cars, trucks or other vehicles and prior to the unloading and yarding thereof, in the regular course of business. . . .

Los Angeles: Los Angeles Union Stockyards Co., Los Angeles, Calif. Tariff No. 16, effective February 10, 1957.

1. THE PRIVILEGE OF THE MARKET

(b) This Company offers to grant to persons (which term includes individuals, partnerships, corporations, or associations) the privilege of selling, buying, or trading in livestock at this Market, or otherwise of engaging in appropriate business at this Stockyard, subject to the rates, charges, and regulations of this Company published and filed with the Secretary of Agriculture, the provisions of of the Act, and the applicable regulations of the Secretary of Agriculture, and these and any other regulations, rules, or practices of this Company established for the conduct and operation of this Stockyard.

3. OWNERS OF LIVESTOCK

(c) Any owner many handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without discrimination reasonable facilities and services. . . .

4. MARKET AGENCIES

(b) No person will be permitted to engage in the business of selling or buying livestock on a commission basis or furnishing stockyard services as a market agency at this Market without the express permission of this Company.

(h) This Company reserves the right to revoke any permission, and withdraw the privilege of engaging in the market agency business at this Stockyard, granted to any person who fails to comply with the provisions of the Act, or the regulations, rules, or orders of the Secretary of Agriculture thereunder, or the regulations, rules, and practices of this Company, and such permission and privilege will be terminated and revoked whenever such person discontinues engaging in the market agency business at this Stockyard.

10. INTERFERENCE WITH OPERATIONS

(a) No person engaging in or doing business at this Stockyard shall solicit or otherwise interfere with the owners, carriers, or attendants of incoming livestock upon the property of this Company or upon the streets or rights

of way adjacent thereto, prior to delivery of such livestock to the consignee, or solicit or otherwise attempt to cause the reconsignment of any livestock consigned to any market agency engaging in business at this Stockyard.

(b) No person shall by word or action undertake to sell, buy, or trade on any livestock at this Stockyard until such livestock has been delivered to the consignee; or interrupt or interfere with any trading in progress on this Market; or, without their permission, enter any pen in which a seller and buyer are trading on any livestock contained therein; or engage, trade on, sell, or buy any livestock outside of regular market hours.

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert at attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

Louisville: Bourbon Stock Yard Company, Louisville, Ky. Tariff No. 17, effective May 26, 1955.

The privilege of buying, selling, and or trading in livestock on this market shall be subject to the following rules and regulations and to such other rules of the stockyard company as are reasonably necessary for the proper operation of the market.

RULE 1. OWNERS.

(b) Any owner may handle, offer for sale, and sell livestock upon this market, with or without the assistance of

market agencies or dealers, and will be furnished with suitable pens and other facilities and given service equal to that furnished in connection with livestock handled and sold by market agencies, and at the same rates for feed and services. Payment of all yardage, freight, feed, and other charges may be required upon delivery of livestock to this stockyard or before such livestock is delivered to buyer or shipped from this stockyard.

RULE 2. MARKET AGENCIES AND DEALERS.

1. No person, firm, corporation or association will be permitted to engage in the business as a market agency or dealer, of buying or selling, in commerce, livestock, on a commission basis or otherwise, or furnishing stockyard services, at this stockyard, without a license obtained from this Company, valid and effective at such time.

4. Such license will be revoked by this Company whenever the licensee shall:

(b) fail to comply with the provisions of the Packers and Stockyards Act, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this Company, or of any rule, adopted or approved by this Company, to govern trading on this market, or of any condition of such license.

RULE 9. LIMITATION ON PRIVILEGE OF MARKET.

Any person, firm, corporation or association, or any partner, officer, agent, or employee thereof, violating any of these rules and regulations, or using unfair, dishonest, or fraudulent practices in respect to any transaction on this market, or destroying, defacing, or abusing the property of this Company, or in any manner tampering with or unlocking the locks, gates or doors of pens or buildings, or failing or refusing, when requested in writing, to satisfy this Company that such is not being and has not been done, shall be considered a trespasser and may be denied the privilege of this market, excluded from this stockyard and dealt with as a trespasser.

Milwaukee: Milwaukee Stockyards, Milwaukee, Wis. Tariff No. 3, effective August 1, 1954.

5 Any owners or shippers of livestock who desire to handle and sell their own stock, will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

8 No market agency, dealer or person receiving livestock at these yards shall solicit or otherwise interfere with, the owners, drivers, or attendants, of incoming vehicles transporting livestock, on the streets adjacent to or upon the property of this company prior to delivery at unloading chutes.

9 Any person, firm or corporation, by themselves or their employees, violating these rules or using unfair, dishonest or fraudulent practices and any person destroying, defacing, or abusing the property of this Company or in any manner tampering with or unlocking the locks, gates or doors of pens or buildings may be denied the privileges of these yards, treated as a trespasser and dealt with accordingly.

Ogden: The Ogden Union Stockyards Company, Ogden, Utah. Tariff No. 16, effective June 15, 1953.

10. No market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming rail, truck, wagon or drive-in stock upon the streets adjacent to or upon the property of this Company prior to delivery into holding pens, without express permission.

11. No person, without the express permission of this Company in writing, shall solicit any business in these yards for other markets, sales at outside feed yards or country points, or endeavor to secure customers to sell or purchase livestock elsewhere.

Omaha: Union Stock Yards Company of Omaha, Ltd., Omaha, Nebr. Tariff No. 18, effective July 1, 1957.

1. Owners and shippers who desire to handle and sell their own live stock will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and services. . . .

4. No person, firm, or corporation shall be permitted to solicit business in any of the pens, roadways, driveways, docks, or runways of this Company where live stock is handled or in the halls or lobbies of the Exchange Building, as the solicitation of business at such places tends to interfere with the proper and orderly conduct of the business.

Peoria: The Peoria Union Stock Yards Company, Inc., Peoria, Ill. Tariff No. 11, effective August 2, 1955.

3. No person, firm or corporation shall be permitted to solicit business on any roadways, chutes or docks of this Company as the solicitation of business at such places tends to interfere with the proper and orderly conduct of business.

Portland: Portland Union Stock Yards Company, North Portland, Ore. Tariff No. 19, effective April 2, 1956.

1. No person, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at these yards until such person, firm or corporation has entered into an agreement with this Company to observe and obey all rules and regulations adopted by this Company for the government of business at its stockyards; . . .

6. Any owners or shippers of livestock who desire to handle and sell their own stock, will be provided with suitable pens and given services equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

9. No market agency, dealer or person receiving livestock at these yards shall solicit or otherwise interfere with, the owners, drivers, or attendants of incoming truck, wagon, or driven-in stock upon the streets adjacent to or upon the property of this Company prior to delivery at unloading chutes.

10. Any person, firm or corporation, by themselves or their employees, violating these rules or using unfair, dishonest or fraudulent practices and any person destroying, defacing or abusing the property of this Company or in any manner tampering with or unlocking the locks, gates or doors of pens or buildings, or any person gambling, or being intoxicated or bringing intoxicating liquor on the premises may be denied the privileges of these yards, treated as a trespasser and dealt with accordingly.

St. Joseph: St. Joseph Stock Yards Co., South St. Joseph, Mo. Tariff No. 19, effective October 20, 1955.

(1) No person, firm, or corporation shall be permitted to solicit business in any of the roads, driveways, or docks of this Company, where livestock is being handled, since solicitation of business at such places tends to interfere with the proper and orderly conduct of the business of this Company. Any person, firm, or corporation violating any of the provisions of this rule will be denied the privileges of the yards, treated as a trespasser, and dealt with accordingly.

(2) Any owners or shippers of livestock to these yards who desire to handle and sell their own stock without the assistance of commission men or dealers, will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

(10) Any person, firm, or corporation, before engaging in the business of buying or selling livestock on commission or otherwise, at these yards, or before purchasing any established business here, must obtain the permission or approval of this Company to do so. This Company reserves

the right to withhold its permission or approval and deny locations.

(11) It shall be a condition precedent for the commencement and continuation of business at this Company's yards or the market established by the Company therein, that every person, firm, or corporation engaging in or conducting in these yards the business of buying or selling livestock on commission or otherwise shall observe, comply with, and obey the rules and regulations of this Company for the government of business at its stockyards, . . .

St. Louis (National): St. Louis National Stockyards Company, National Stock Yards, Ill. Tariff No. 9, effective October 19, 1956.

SECTION XV

Any firm, corporation or individual by themselves or their employees, detected using unfair, dishonest or fraudulent practices will be denied the privileges of these Stockyards, treated as trespasser and dealt with accordingly.

St. Louis (Mississippi Valley): Mississippi Valley Stockyards, St. Louis, Mo. Tariff No. 8, effective January 19, 1953.

1. All firms, corporations or individuals, by themselves and their attorneys must abide by the rules adopted by the Mississippi Valley Stockyards for the government of business at these yards and whenever the Company shall come into possession of evidence that any firm, corporation or individual, by themselves or by their employees, have violated any of these rules or have committed illegal acts on the premises of the Stockyards, such persons, firm or corporation may be denied the privilege of the yards, treated as trespassers, and dealt with accordingly.

St. Paul: St. Paul Union Stockyards Company, South St. Paul, Minn. Tariff No. 26, effective February 7, 1957.

8. No market agency, dealer or person receiving livestock at these yards shall solicit or otherwise interfere with, the owners, drivers, or attendants of incoming truck or driven-in stock upon the streets adjacent to or upon the property of this Company prior to delivery at unloading chutes.

15. Rule for the establishment of business of buying and selling livestock in commerce or furnishing stockyards services:

(A) Except as provided in these regulations, no person, firm, corporation or association will be permitted to engage in the business as a market agency or dealer of buying or selling in commerce, livestock on a commission basis or otherwise, or furnishing stockyards services at this stockyards, without entering into a contract substantially in the form shown hereinafter set out, with the Company for the conduct of such business. . . .

(D) Such contract will be cancelled and all privileges withdrawn and permission terminated and revoked by this Company whenever the party to such a contract shall:

(2) fail to comply with the provisions of the Packers and Stockyards Act, or of any regulation or order of the Secretary of Agriculture made thereunder, or of any rule or regulation of this Company, or of any rule adopted or approved by this Company, to govern trading on this market.

(F) This Company will not permit, without the express consent of this Company, any person to engage in business or to be employed at this stockyards who has engaged in activities or practices of a dishonest or fraudulent character liable to affect the prestige of this market and the volume of livestock movement, or cause damage to this Company or others authorized and permitted to engage in business at this stockyards, regardless of whether such ac-

tivities or practices may have been the subject of administrative or court proceedings under the Act resulting in the imposition of sanctions or penalties.

Salt Lake: Salt Lake Union Stock Yards, North Salt Lake, Utah. Tariff No. 8, effective May 1950.

RULE 1:

Any person, firm, or corporation, before engaging in the business of buying or selling live stock on commission or otherwise, at these yards, or before purchasing any established business here, must obtain the permission or approval of this Company to do so. . . .

RULE 2:

Owners or shippers of livestock who desire to handle or sell their own stock, without the assistance of commission firms or dealers, will be provided with suitable pens and given the same service as for stock handled through such agencies, and the same rates for feed, yardage, etc.

RULE 8:

No market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming rail, truck, wagon or drive-in stock upon the streets adjacent to or upon the property of this Company prior to delivery into holding pens, without express permission.

San Antonio: Union Stock Yards San Antonio, Inc., San Antonio, Texas. Tariff No. 13, effective May 1, 1955.

NO. 2. THE PRIVILEGE OF THE MARKET

(b) This Company offers to grant to persons (which term includes individuals, partnerships, corporations, or associations) the privilege of selling, buying or trading in livestock at this Market, or otherwise of engaging in appropriate business at this Stockyard, subject to the rates,

charges, and regulations of this Company published and filed with the Secretary of Agriculture, the provisions of the Act, and the applicable regulations of the Secretary of Agriculture, and these and any other regulations, rules, or practices of this Company established for the conduct and operation of this Stockyard.

No. 3. Owners of Livestock

(c) Any owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without discrimination reasonable facilities and services. . . .

No. 4 Market Agencies

(b) No person will be permitted to engage in the business of selling or buying livestock on a commission basis or furnishing stockyard services as a market agency at this Market without the express permission of this Company.

(h) This Company reserves the right to revoke any permission and withdraw the privilege of engaging in the market agency business at this Stockyard, granted to any person who fails to comply with the provisions of the Act, or the regulations, rules or orders of the Secretary of Agriculture thereunder, or the regulations, rules and practices of this Company; and such permission and privilege will be terminated and revoked whenever such person discontinues engaging in the market agency business at this Stockyard.

No. 10 Interference With Operations

(a) No person engaging in or doing business at this Stockyard shall solicit or otherwise interfere with the owners, carriers, or attendants of incoming livestock upon the property of this Company or upon the streets or rights of way adjacent thereto, prior to delivery of such livestock to the consignee, or solicit or otherwise attempt to cause the reconsignment of any livestock consigned to any market agency engaging in business at this Stockyard.

(b) No person shall by word or action undertake to sell, buy or trade on any livestock at this Stockyard until such

livestock has been delivered to the consignee; or interrupt or interfere with any trading in progress on this Market; or, without their permission, enter any pen in which a seller and buyer are trading on any livestock contained therein.

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, nor shall any other person upon Stock Yard Company property—

(1) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or

(2) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

San Francisco: South San Francisco Union Stockyards, South San Francisco, Calif. Tariff No. 8, effective March 25, 1957.

8. No person, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at this yards until such person, firm or corporation has entered into an agreement with this Company to observe and obey all rules and regulations adopted by this Company for the government of business at its stockyards; . . .

9. No market agency, dealer or person receiving livestock at this yards shall solicit or otherwise interfere with the owners, drivers or attendants of incoming truck, wagon or driven-in stock upon the streets adjacent to or upon the property of this Company prior to delivery at unloading chutes.

Sioux City: The Sioux City Stock Yards Company, Sioux City, Iowa. Tariff No. 16, effective June 4, 1957.

5 Any owners or shippers of live stock who desire to handle and sell their own stock, will be provided with

suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

8 (a) No person, firm or corporation shall engage in business as a market agency or the business of dealing in live stock at these yards until such person, firm or corporation has entered into an agreement with this Company to observe and obey all rules and regulations adopted by this Company for the government of business at its stock yards; . . .

9 No market agency, dealer or person receiving live stock at these yards shall solicit, attempt to cause reconsignment, or otherwise interfere with the owners, drivers, or attendants of incoming truck live stock upon the streets adjacent to or upon the property of this Company.

Sioux Falls: Sioux Falls Stock Yards Company, Sioux Falls, S. D. Tariff No. 12, effective May 6, 1957.

5 Any owners or shippers of live stock who desire to handle and sell their own stock, will be provided with suitable pens and given service equal to that furnished for stock handled through any other agency, and at the same rates for feed and service. . . .

8 a. No person, firm or corporation shall engage in business as a market agency or the business of dealing in live stock at these yards until such person, firm or corporation has entered into an agreement with this Company to observe and obey all rules and regulations adopted by this Company for the government of business at its stock yards; . . .

9 No market agency, dealer or person receiving live stock at these yards shall solicit, attempt to cause reconsignment, or otherwise interfere with, the owners, drivers, or attendants of incoming truck livestock upon the streets adjacent to or upon the property of this Company.

Stockton: Stockton Union Stockyards, Stockton, Calif. Tariff No. 6, effective April 8, 1957.

1.(A) No person, firm, corporation, or association will be permitted to engage (or, if already so engaged, continue beyond December 31, 1954, to engage) in the business, as a market agency or dealer, of buying or selling in commerce, livestock, on a commission basis or otherwise, or furnishing stockyards services, at this stockyards, without entering into a contract in the form set forth below, or in such other form as the Company may, from time to time, prescribe:

8. Subject to the terms and conditions of this contract, SECOND PARTY hereby agrees to conduct its business in such a manner as will promote the best interests and welfare of this market, and SECOND PARTY agrees expressly that none of its operations will be conducted in any manner detrimental to the best interests of STOCKYARDS COMPANY. It is expressly understood and agreed that SECOND PARTY will take every reasonable action to promote the flow of livestock to this stockyards.

SECOND PARTY expressly agrees to conduct, in good faith, substantial business operations at this stockyards. It is further expressly understood and agreed by the parties that, in determining whether SECOND PARTY is, in good faith, conducting substantial business operations at this stockyards, STOCKYARDS COMPANY may take the following factors into consideration without, in any wise, being limited thereto; (a) the relationship which the volume of business conducted by SECOND PARTY at this market bears to the total volume of business conducted by all market agencies or dealers, as the case may be, at this market, computed on a per head basis by species; (b) if SECOND PARTY engages in business at places elsewhere than at this stockyards, the relationship which the business of SECOND PARTY conducted at this stockyards bears to the total business of SECOND PARTY, computed on a per head basis by species; (c) and the activities, if any of SECOND PARTY which evidence an intent or purpose on the part of SECOND PARTY, or any officer or employee thereof, or of any other person, firm, corporation or association affiliated or associ-

ated therewith, to prevent the flow of livestock to this stockyards. For the purpose of determining compliance with this provision of this contract, SECOND PARTY agrees to report annually to STOCKYARDS COMPANY the amount of business conducted at this stockyards and away from this stockyards by SECOND PARTY, setting forth the number of head of each species so handled under each category.

(C) The Company reserves the right to cancel, or to refuse to renew, any such contract, as aforesaid, with any market agency or dealer buying or selling livestock on a commission basis, or otherwise, or furnishing stockyards services at this stockyards, if such market agency or dealer shall:

(3) fail to conduct, in good faith, substantial business operations at this stockyards during any term of such contract: PROVIDED, THAT, in determining whether any such market agency or dealer is, in good faith, conducting substantial business operations at this stockyards, the Company shall take into consideration, but shall not be limited to, the following factors:

(a) the relationship which the volume of business conducted by any such market agency or dealer at this stockyards bears to the total volume of business conducted by all market agencies or dealers at this stockyards (computed on a per head basis by species);

(b) if such market agency or dealer engages in business at places elsewhere than at this stockyards, the relationship which the business of such market agency or dealer conducted at this stockyards bears to the total volume of business of such market agency or dealer (computed on a per head basis by species); and

(c) the activities, if any, of such market agency or dealer which evidence an intent or purpose on the part of such market agency or dealer to prevent the flow of livestock to this stock-stockyards;

(6) . . . do anything to detract shippers of livestock in the natural trade territory of this stockyards from shipping their livestock to this stockyards, or

(7) fail to take every reasonable action to promote the flow of livestock to this stockyards.

8. No market agency, dealer, or person receiving livestock at this yards shall solicit or otherwise interfere with the owners, drivers or attendants of incoming livestock upon the streets adjacent to or upon the property of this Company prior to delivery at unloading chutes.

Wichita: The Wichita Union Stock Yards Company, Wichita, Kansas. Tariff No. 13, effective March 5, 1955.

(A) BOND AND OTHER REQUIREMENTS:

No person, firm or corporation shall engage in the livestock commission business or the business of dealing in livestock at these yards until such person, firm or corporation has entered into an agreement with this Company to observe and obey all rules and regulations adopted by this Company for the government of business at its stock yards; . . .

(C) SOLICITING ON STOCK YARDS COMPANY'S PREMISES NOT ALLOWED:

No person, firm or corporation shall be permitted to solicit business in any of the pens, roadways, driveways, docks, or runways of this Company where livestock is handled or in the halls or lobbies of the Exchange Building, as the solicitation of business at such places tends to interfere with the proper and orderly conduct of the business.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For National Live Stock Producers Association, Amicus Curiae.

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INDEX.

Table of Contents

	PAGE
Preliminary Statement	1
Statement of Interest	2
Statement of the Case	4
Summary of Argument	6
Argument	7
I. The Challenged Regulation is Diametrically Opposed to the Objectives of the Packers and Stockyards Act and is, therefore, Unlawful	7
II. The Challenged Regulation is Discriminatory and Thus is in Contravention of Affirmative Public Utility Law	10
III. The "Full Hearing" Requirement of the Packers and Stockyards Act Does Not Necessitate the Admission of Evidence in all Cases	13
IV. The Presentment of Evidence Was Not Necessary to Establish That the Challenged Regulation was Invalid as a Matter of Law	16
V. The Circuit Court of Appeals Did Not Deprive the Secretary of Agriculture of His Primary Jurisdiction in Ruling That the Regulation was Invalid on its Face	21
VI. The Circuit Court of Appeals Did Not Evade Administrative Authority by Instructing the Secretary of Agriculture to Issue a Cease and Desist Order	23
Conclusion	24

TABLE OF CASES—

Bowles v. Albert Glauser, Inc., 61 F. Supp. 428 (1945) 9
General American Tank Car Corporation v. Eldorado Terminal Company, 308 U.S. 422, 84 L. Ed. 361 (1939) 22
Great Northern Ry. Co. v. Merchants Elev. Co., 259 U.S. 285, 66 L. Ed. 943 (1922) 22
Houfburg v. Kansas City Stockyard Company of Maine, Mo., 283 S.W. (2d) 539 (1955) 8
Kelly v. Union Stockyard and Transit Company, 190 F. (2d) 860 (1951) 21
Midwest Farmers v. United States, 64 F. Supp. 91 (1945) 10
Morgan v. United States, 298 U. S. 468, 80 L. Ed. 1288 (1936) 14
Morgan v. United States, 304 U. S. 1, 82 L. Ed. 1129 (1938) 14
Nacogdoches Light & Power Co. v. Thomas & Richardson, Tex. Civ. App. 138 S.W. 1080 (1911) 18
Nashville Union Stockyards v. Grissim, 153 Tenn. 225, 280 S.W. 1015 (1926) 20
People v. Public Service Commission, 148 N.Y.S. 583 (1914) 11
Seaton Mountain Electric L. H. & P. Co. v. Idaho Spring Inv. Co., 49 Colo. 122, 111 P. 834 (1910) 19
Stafford v. Wallace, 258 U. S. 494, 42 S. Ct. 397 (1922) 10
State v. Citizen's Tele. Co., 61 S.C. 83, 39 S.E. 257 (1901) 11
Strathie v. Bucks County Electric Co., P.U.R. 1920-D, p. 290 19
Tagg Brothers and Moorhead v. United States, 280 U. S. 420, 74 L. Ed. 524 (1930) 22
Union Electric Light and Power Company, P.U.R. 1932-B Page 1 12

United States v. Donahue Bros.,
59 F. (2d) 1019, 8th Circuit, (1932) 9
United States v. O'Rourke,
116 F. Supp. 857 (1953) 8

STATUTES

Packers and Stockyards Act, 7 U.S.C. Section 181, et seq.
Section 205 10
Section 208 7
Section 211 13

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PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For National Live Stock Producers Association, Amicus Curiae.

Preliminary Statement.

This Brief is filed pursuant to the consent of the parties hereto and in support of the decision of the United States Court of Appeals for the Tenth District, reported in 241 F. (2d) 192.

Statement of Interest

Your Amicus Curiae, the National Live Stock Producers Association, is a not-for-profit organization composed of 23 cooperative livestock marketing agencies having offices in 33 states and marketing the livestock of their individual producer members, the latter group totaling 557,000. The marketing activities of these organizations occur in the principal stockyards and other points throughout the United States. Substantially similar regulations to that which is herein involved have been proposed at other stockyards in this country. The enforcement of these will cause irreparable financial hardship and loss to the livestock producers by greatly impairing the effectiveness and efficiency of their cooperative marketing agencies. As a result, your present Amicus Curiae desires to make its position known to this court in an attempt to forestall the dire consequences which would result from a successful enforcement of the regulation challenged in these proceedings.

The following is a list of the membership of the National Live Stock Producers Association, together with their individual locations:

Member	Location
California Farm Bureau Mktg. Assn.	Visalia, California
Chicago Producers Commission Assn.	Chicago, Illinois
Cincinnati Live Stock Producers Assn.	Cincinnati, Ohio
Equity Co-op. Livestock Sales Assn.	Milwaukee, Wisconsin
Evansville Producers Commission Assn.	Evansville, Indiana

Michigan Live Stock Exchange	Detroit, Michigan
Mississippi Livestock Producers Assn.	Jackson, Mississippi
Oklahoma Livestock Marketing Assn.	Oklahoma City, Oklahoma
Peoria Producers Commission Assn.	Peoria, Illinois
Producers Co-operative Commission Assn.	Buffalo, New York
Producers Livestock Association	Columbus, Ohio
Producers Marketing Association, Inc.	Indianapolis, Indiana
Producers & Texas Livestock Mktg. Assn.	Kansas City, Missouri
Producers Livestock Marketing Assn.	Louisville, Kentucky
Producers Live Stock Marketing Assn.	National Stock Yards, Illinois
Producers Livestock Marketing Assn.	Salt Lake City, Utah
Producers Live Stock Marketing Assn.	Omaha, Nebraska
Producers Commission Association	Sioux City, Iowa
Producers Live Stock Commission Co.	Springfield, Illinois
Producers Livestock Marketing Assn.	South St. Joseph, Missouri
Tennessee Producers Livestock Mktg. Assn.	Nashville, Tennessee
Texas Livestock Marketing Association	Fort Worth, Texas
Valley Livestock Marketing Assn.	Stockton, California

STATEMENT OF THE CASE.

The Denver Union Stock Yard Company promulgated the following regulation designated as 10(c):

> "(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard property, or elsewhere, nor shall any other person upon Stock Yard Company property—
>
> "(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> "(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or
>
> "(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.
>
> "The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:
>
> The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.
>
> "The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

Proceedings were instituted before the Secretary of Agriculture by the Respondent to expunge this particular regulation from the Stockyard's Tariff. It was urged in those proceedings that this section was unlawful as a matter of law. The Secretary, however, took the position that such was not the case, and a hearing was necessary including the submission of evidence in order for him to ascertain the validity or invalidity of the regulation. Accordingly, the complaint was dismissed. The Respondent then appealed to the Circuit Court of Appeals for the Tenth Circuit and that tribunal found the regulation invalid upon its face and remanded the proceedings back to the Secretary with instructions to " * * * vacate the order dismissing Petitioner's complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its regulation 10(c)." This case is here on appeal from that decision.

The exact procedural steps are set out in detail in the briefs of the principal parties herein and, therefore, there will be no attempt to restate them in this document.

SUMMARY OF THE ARGUMENT.

This Amicus Curiae is of the considered opinion that the regulation in controversy is invalid on its face as a matter of law. Therefore, the decision of the Secretary of Agriculture was erroneous and that of the lower court in these proceedings was correct and should be affirmed by this court. The arguments sustaining this position can readily be summarized.

The regulation which the Denver Union Stock Yard Company sought to enforce is diametrically opposed to the objectives of the Packers and Stockyards Act. Further, it violates the basic precept of public utility law that exclusive patronage cannot be demanded as a condition precedent to the furnishing of utility services. As a result, it is invalid as a matter of law, and it was unnecessary for the Secretary of Agriculture or any of his subordinates to hear evidence in order to arrive at this determination.

In answer to the arguments of the opposition contained in their briefs, it will be demonstrated that the hearing had at the administrative stages of this proceeding was in full compliance with the requirements of the Packers and Stockyards Act, and in arriving at its decision the lower court did not usurp any authority granted by that statute to the Secretary of Agriculture.

ARGUMENT.

I.

The Challenged Regulation is Diametrically Opposed to the Objectives of the Packers and Stockyards Act and is, therefore, Unlawful.

A stockyard, in transacting business, must naturally engage in many types of activities and furnish those who deal with it a variety of services and facilities. In order to accomplish these manifold tasks it is necessary for it to adopt regulations and rules of practice and procedure governing not only its own conduct but that of those granted access to its property, facilities and services. This right to regulate the conduct of third parties is not, however, without a degree of restraint. The basis of such restriction is found in the Packers and Stockyards Act, Section 208:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. (1952) Section 208.

The very terms of the statute limit the power of those regulated thereby to promulgate rules and practices for themselves and others. If those created are unjust, unreasonable or discriminatory, they automatically become unlawful and invalid.

It is irrefutable that a regulation operating directly contra to the objectives of the present statute would be considered unreasonable, unjust or discriminatory. Any other conclusion would render the Packers and Stockyards Act ineffective since rules or regulations of those governed thereby could circumvent its basic tenets. It is the position of this Amicus Curiae that the basic objectives of the Packers and Stockyards Act are violated by regulation 10(c) contained in the Tariff of the Denver Union Stock Yard Company.

The courts of this country have, at various times, enunciated the objectives sought to be accomplished through this statute. The first of these is to eliminate discriminatory and unfair practices. This policy has been adequately described in the following decisions:

> *United States* v. *O'Rourke,* 116 F. Supp. 857 (1953): "The purpose of this Act is to insure without discrimination reasonable stockyards' service * * * reasonable and non-discriminatory rates * * * and the elimination of unjust or discriminatory practices."
>
> *Houfburg* v. *Kansas City Stockyard Company of Maine, Mo.,* 283 S. W. (2d) 539 (1955): "The Packers and Stockyards Act was enacted to remedy abuses that have grown up in the large stockyards of the country in that packers, stockyards, owners, commissionmen and dealers were engaged in unfair, monopolistic and discriminatory practices."

The exclusive patronage requirement of 10(c) actually breeds discrimination. It creates preferences between those who can and will transact all their business in the area through the stockyards and those who cannot or are unwilling to eliminate their off-the-yards connections. The latter group is absolutely excluded from the yards' facilities. It is important to notice that such preference is by its very terms arbitrary and without reason. It

provides for no exceptions and is applicable whether the result achieved is beneficial or detrimental to the public, the producers, marketing agencies or the stockyard itself. The Act provides that a " * * * discriminatory regulation or practice is prohibited and declared to be unlawful." The regulation under scrutiny reeks of such discrimination and, therefore, the conclusion of the lower court that it is unlawful on its face should be affirmed.

Another aim of the Act is to guarantee free and open competition thus allowing livestock producers to obtain a fair price for their animals. Again, the language of the courts clearly enunciates the presence of this objective.

> *Bowles* v. *Albert Glauser, Inc.*, 61 F. Supp. 428 (1945): "It is the declared public policy of the government to maintain public stockyards * * *. Government supervision of public stockyards has for one of its prime purposes the maintenance of open and free competition of buyers aided by the sellers' representatives. Such a system results in the payment of the highest market price for the producers' product that such arrangement can effect not exceeding, however, the maximum price set by government order."
>
> *United States* v. *Donahue Bros.*, 59 F. (2d) 1019, 8th Circuit, (1932): "One of the purposes of this Act was to protect the owner and shipper of livestock and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, over-reaching manipulation or other unfair practices might not return to him a fair return for his product."

This concept of free and open competition is drastically curtailed by the exclusive patronage doctrine adopted by the challenged regulation. In the proscribed area a market-

ing agency will either utilize the yards' facilities exclusively or not at all. It will be forced to cease transacting business through either the stockyard or its other marketing connections. Thus, the weaker markets in the area will slowly disappear and the stronger ones will develop into monopolies, a trend diametrically opposed to the principle of free and open competition. The regulation being in direct violation with the Packers and Stockyards Act as interpreted by the courts of this country must, of necessity, be declared invalid.

II.

The Challenged Regulation is Discriminatory and Thus is in Contravention of Affirmative Public Utility Law.

The Denver Union Stock Yard Company is a posted stockyard within the scope of the Packers and Stockyards Act. Such yards have, since the enactment of the statute, been accepted and treated by the courts as public utilities; *Stafford* v. *Wallace*, 258 U. S. 494, 42 S. Ct. 397 (1922) and *Midwest Farmers* v. *United States*, 64 F. Supp. 91 (1945). This conclusion has resulted from an interpretation of the various provisions of the Act but basically the following section:

> "It shall be the duty of every stockyard's owner and market agency to furnish upon request without discrimination reasonable stockyards service * * *" 7 U.S.C. (1952) § 205.

Being a public utility it is the duty of a posted stockyard to permit the utilization of its facilities and services without discriminatory or unreasonable requirements. The effect of the foregoing quoted regulation in the Denver Yard's Tariff is to require the Respondent and all in its position to market exclusively through the former's yards

or not at all. Such requirement is unreasonable, discriminatory and violates all basic legal concepts controlling the operation of public utilities.

The question of whether or not a public utility can require exclusive allegiance as a condition to the furnishing of its services has been in issue before the courts and commissions of this country on a number of occasions.

For instance, in the case of *State* v. *Citizen's Tele. Co.*, 61 S.C. 83, 39 S.E. 257 (1901), an individual applied to the defendant utility for its telephone service. His application was refused on the grounds that he also subscribed to the Bell Company's facilities and, therefore, was not eligible for the service he requested. The defendant had adopted a policy of refusing to service those who did not patronize its facilities exclusively. The applicant instituted litigation requesting that the court find the practice invalid and require the company to furnish the requested service. The defendant contended that in the operation of its business it could adopt any rules, regulations or practices it desired. The court, however, ruled for the applicant and stated:

> "It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell telephone system in operation in the same city, but use exclusively respondent's system, than a railroad company to refuse to transport the goods of a shipper unless such shipper would agree to patronize its line exclusively and not to give any of its business to any competing railway line."

In another case, that of *People* v. *Public Service Commission*, 148 N.Y.S. 583 (1914), the Edison Company at-

tempted to enforce exclusive patronage by refusing to install or continue its services to individuals obtaining a portion of their electric power from other utilities. The court in deciding against the exclusive allegiance requirement commented as follows:

> "In our opinion, however, the requirement that a customer obtain all of its electricity from one company or receive none at all is not in any proper sense a regulation respecting the use of the service but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electrical current."

As a principle of law, the concept that a public utility cannot demand exclusive patronage as a condition precedent to the furnishing of services is so well established that even on the utility commission level it is applied without question. Thus, In Re: *Union Electric Light and Power Company, P.U.R.* 1932-B. Page 1, the situation was as follows: The particular utility involved provided its customers with heat and electricity. It refused, however, to furnish the former to anyone who did not subscribe for the latter. This practice was inserted in its schedule, and the commission was required to rule on its validity. That tribunal found that the regulation resulted in discrimination and was, therefore, void.

It is inescapable on the basis of the above decisions that a demand for exclusive allegiance in the public utility field is illegal per se. As the regulation in controversy requires such exclusive allegiance it is in direct violation of this principle and, therefore, invalid.

III.

The "Full Hearing" Requirement of the Packers and Stockyards Act Does Not Necessitate the Admission of Evidence in all Cases.

It will be recalled that the Secretary of Agriculture refused to grant the relief requested in the complaint on the grounds that a hearing would be necessary prior to any determination of the validity or invalidity of the regulation. It was contended that unless evidence was heard, the Secretary would be without a basis for considering the reasonableness or unreasonableness of the exclusive patronage requirement. However, the appeals Court in its opinion held that since the regulation was invalid on its face, the submission of evidence was unnecessary. It is now contended on appeal by several of the opposition that the court erred in finding that the introduction of evidence in the administrative stages of this proceeding was not a necessary requirement. They point out that Section 310 of the Packers and Stockyards Act (7 U.S.C 211) requires that a "full hearing" be given prior to the determination of whether any regulation or practice of a stockyard is unjust, unreasonable or discriminatory. It is next contended that in order to be considered a "full hearing" evidence must be presented during the proceedings, and thus it is concluded that the procedure before the Secretary of Agriculture was insufficient to enable him to do other than dismiss the complaint. Based upon this argument it is urged that the lower court erred in reversing the Secretary's decision.

It is true that the Act contains a "full hearing" requirement, but it is submitted that this requisite was satisfied in the present case. The complaint filed before the

Secretary of Agriculture alleged that the regulation contained in the Denver Union Stock Yard Company's Tariff was unlawful (R. 40). A hearing was had in the administrative stages on that particular issue, to-wit, the legality of regulation 10(c). No evidence was taken in relation thereto and the Respondent refused to submit any, resting its case upon the theory that the rule was void as a matter of law. The arguments in these proceedings were legal in nature and no testimony or other evidence appears in the record. It is obvious, however, from an examination of the law that this type of procedure satisfies the "full hearing" requirement incorporated in the Packers and Stockyards Act.

The famous *Morgan* cases are the sole decisions attempting to establish the elements of a "full hearing" under this particular Act. The first decision in this line of cases, that of *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288 (1936), merely concerned itself with the process of arriving at a decision. The second, however, *Morgan* v. *United States*, 304 U. S. 1, 82 L. Ed. 1129 (1938), did attempt to set out a number of procedural requisites necessary to a "full hearing". In describing this type of hearing the court, on page 19, stated:

> "Congress in requiring a 'full hearing' had regard to judicial standards, not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

Thus, it establishes the fact that the elements of a "full hearing" in administrative procedure are those which are ordinarily accepted in our judicial processes and nothing more. Obviously, at a hearing in a court of law where only a question of law is involved, due process would not

require the submission of evidence. To necessitate testimony in such instance would be unrealistic as the only issue before the tribunal is one concerning the law. As was stated above, all parties were given ample opportunity to present their legal arguments before the Secretary and, therefore, it becomes apparent that a "full hearing" was accorded and received.

An additional requisite of a "full hearing" established by the second *Morgan* case is the requirement that all parties must be given "* * * a reasonable opportunity to know the claims of the opposing party and to meet them." (Page 18). Thus, one of the essentials of a "full hearing" is that the parties be apprised of their opposition's contentions and be allowed to contradict them to the fullest extent. The only argument urged during the administrative proceedings in the present case was that regulation 10(c) was invalid as a matter of law. This was known at the outset by the parties concerned, and it is established that oral and written arguments as to its legal validity were offered by both sides. All parties had the opportunity to meet the sole contention manifesting itself in the proceeding, to-wit, that as a matter of law the contested regulation was invalid. As the opposition was apprised of the sole issue involved and given an adequate opportunity to reply, all the essentials of the "full hearing" requirement in the statute as established by the second *Morgan* decision were satisfied.

It is not true, as is insisted in the briefs of several of the parties to this proceeding, that the *Morgan* cases in establishing the scope of a "full hearing" require that the parties present testimony or other evidence. The only requisite set forth in those decisions is that the par-

ties be given an opportunity to submit all of their arguments in the light of the issues presented. The *Morgan* cases involved issues of fact and, as a result, the court, in passing, stated that evidence should be presented. However, the only issue present in the case at hand was a legal one, and that particular aspect was fully argued with all interested parties given full opportunity to submit their views.

Under these circumstances a "full hearing" was had before the Secretary of Agriculture and, as a result, it cannot be argued that this proceeding was not in conformity with the Packers and Stockyards Act.

IV.

The Presentment of Evidence Was Not Necessary to Establish That the Challenged Regulation Was Invalid as a Matter of Law.

The Petitioner also contends that the Secretary of Agriculture's power to issue a cease and desist order in regard to any rule, regulation or practice issued or indulged in by a stockyard depends entirely upon whether such is "unreasonable" within the terms of the Act. It is insisted that the finding of "unreasonable" is always a matter of fact, and since it is an issue of fact it can only be established after the hearing of evidence. Thus, in the present situation as no evidence was submitted by the respondent, the Secretary was justified in dismissing its complaint and the court erred in determining that such dismissal was improper. This contention is untenable. The regulation was attacked merely on the basis that it was illegal on its face, to-wit, that it did not conform to accepted legal principles. No issue of fact was ever raised by the Respondent, and it did not automatically present itself by the mere filing of the complaint. The Secretary

may issue a cease and desist order if a regulation is "* * * unjust, unreasonable or discriminatory". There is nothing in this language necessitating a finding of fact. A regulation can be considered unjust, unreasonable or discriminatory if it violates a principle of law as well as if under a given factual situation it works an unjust, discriminatory or unreasonable consequence.

In its brief the Petitioner devotes many pages to the development of the thesis that the unreasonableness of a regulation or practice depends of necessity on the facts of the situation. This is probably true in many controversies brought before the Secretary. Under these circumstances, evidence would have to be presented for him to become apprised of the situation and develop an opinion as to the merits of either side. However, this does not mean that every situation brought before him will involve a factual question. The only issue upon which the Secretary was requested to rule in the present proceedings was whether as a matter of law the regulation was invalid. In determining this the introduction of evidence was unnecessary. This can be easily demonstrated.

It has been adequately illustrated in the foregoing portions of this brief that the regulation in question not only violates the basic policy underlying the Packers and Stockyards Act but is inconsistent with concepts applicable to public service companies. It is, therefore, invalid on its face and as a matter of law. There was no necessity for a hearing as no fact elicited therein could have legally justified a demand for exclusive patronage. No reason could have been submitted which would permit the sanctioning of this type of regulation. Even if the continued profitable operation of the stockyard depended upon the enforcibility of the exclusive patronage requirement, the latter could not be tolerated.

That there can be no excuse, reason or justification for an exclusive patronage requirement has been concluded by a number of decisions. Typical among these is *Nacogdoches Light & Power Co.* v. *Thomas & Richardson, Tex. Civ.* App. 138 S.W. 1080 (1911), involving a situation wherein the defendant's electricity had been utilized to illuminate the plaintiffs' business premises. The latter, having installed a gas lighting system, desired to retain defendant's facilities on a standby basis. The utility, however, refused to furnish electricity, justifying its action on a company regulation forbidding the furnishing of its services to anyone lighting their premises with gas. The plaintiffs instituted an action to compel the restoration of the electricity, contending that the rule was unreasonable and discriminatory. In opposing this argument the company, among other things, stated that it would have to abandon its business if all of its subscribers were permitted to treat it as a standby service. Despite this financial reason, the company's exclusive patronage rule was stricken, the court reasoning as follows:

> "The effect of such a rule, if enforced, can easily be seen. The tendency would be to drive one or the other system out of business and to give the one remaining a monopoly of the business. If appellant had the right to impose this condition as to the use of gas, it would have equally the right to impose it as to the use of kerosene lamps or candles and thus compel all of its customers to use its lights alone or do without its service entirely. Such a rule or regulation is *on its face unreasonable* and could not be enforced."

If the rule requiring exclusive patronage in the foregoing decision was considered invalid on its face despite compelling financial reasons, the regulation of the Denver Stock Yards must be given the same effect.

A similar argument as to the financial necessity of an exclusive patronage requirement met the same fate in *Strathie* v. *Bucks County Electric Co.*, P.U.R. 1920 D, p 290. There the complainant, a drug store proprietor, had purchased all of his electric power requirements from the defendant. Subsequently, however, the former's landlord installed a small generator, and the complainant proposed to utilize the utility's electricity only when the private source proved inadequate. The defendant electric company, having promulgated a rule requiring its customers to use its service exclusive of all others, refused to furnish any electricity to the complainant on such basis. The sole issue before the Utilities Commission was whether the company's refusal and the regulation on which it was based were valid. The latter contended that it had a right to the profitable as well as the unprofitable business in the community and that its regulation aided in achieving this result. The Commission was not convinced by this argument, and the exclusive patronage requirement was held unreasonable.

This rule against discrimination by way of a demand for exclusive patronage has been maintained even in instances where it is obvious that a utility will either have to abandon certain of its services or possibly face financial ruin. Consider the decision in *Seaton Mountain Electric L, H. & P. Co.* v. *Idaho Spring Inv. Co.*, 49 Colo. 122; 111 P. 834 (1910). The utility furnished electricity and steam heat, the latter being a by-product of the former, to the neighboring community. The plaintiff subscribed to the steam heat service but purchased its electric power elsewhere. Subsequently, those customers utilizing steam heat were notified that unless the company was allowed to furnish them with electric power also, the former service

would be discontinued. The plaintiff thereupon instituted an action seeking to enjoin the utility from terminating this service. The defendant argued that as heat was a by-product of generating electricity, there would be insufficient electricity produced to provide the required amount of heat unless it could demand exclusive patronage, and to produce the latter independent of electricity would be very expensive. Despite this contention, the court found the proposed company rule unreasonable and enjoined its operation. It is obvious from the very facts that the utility could not continue to operate as it had been without the benefit of an exclusive patronage requirement. This factor, however, was immaterial as the company was under a duty to furnish its services without discrimination.

The principle that there can be no justification for a public utility to deny its facilities or services to a patron doing business elsewhere has already been applied by a state court to a stockyard regulated by the Packers and Stockyards Act. The case is that of *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015 (1926) and involved a suit by a stockyard to enjoin an individual from its premises on the ground that the latter was diverting business to other yards, thus causing financial injury to the plaintiff. The court, in deciding on the basis of the pleadings that the yard was not entitled to relief, alluded to the fact that the Packers and Stockyards Act required the furnishing of services and facilities without discrimination and, therefore, the defendant could not be excluded because of outside marketing activities. The important point is that this conclusion was achieved without the admission of evidence and in the face of the allegation that an injury was suffered by the plaintiff due to defendant's off-the-yard marketing. The court, in effect, found as a matter of law that the defendant's outside

marketing activities did not justify his exclusion despite the injury caused plaintiff.

The foregoing decisions aptly demonstrate the fact that an exclusive patronage requirement in the public utility field will not be tolerated regardless of the situation. There are no exceptions or modifications of this rule depending upon the facts of each and every case. This being true, a rule, regulation or demand of this character is invalid on its face and no facts submitted or arguments propounded could justify it. Under these circumstances it becomes obvious that a hearing before the Secretary at which time evidence would have been submitted was unnecessary.

V.

The Circuit Court of Appeals Did Not Deprive the Secretary of Agriculture of His Primary Jurisdiction in Ruling That the Regulation was Invalid on its Face.

It is argued in the brief of the American Stockyards Association, which appeared as amicus curiae supporting the Secretary of Agriculture's position, that the Circuit Court of Appeals in reviewing the decision usurped the Secretary's power when it determined that the regulation involved was invalid. It urges that this determination was within the primary jurisdiction of the Secretary under the terms of the Act. It is true that at least one Federal court has applied the doctrine of primary jurisdiction to the Packers and Stockyards Act. *Kelly* v. *Union Stockyard and Transit Company*, 190 F. (2d) 860 (1951). This doctrine requires that initially the administrator or administrative tribunal which has been delegated the responsibility for the administration of a statute must be allowed to come to grips with any controversy within the scope of the Act before judicial relief is sought. The doctrine, however,

does not foreclose subsequent judicial review after an administrative determination has been made. This court has on occasions stated that the application of the concept of primary jurisdiction does not deprive a court of its power to subsequently adjudicate. See for instance, *General American Tank Car Corporation* v. *Eldorado Terminal Company*, 308 U.S. 422, 84 L. Ed. 361 (1939). Upon this basis it becomes very obvious that the concept has not in any way been violated in these proceedings.

In the case at bar the issue concerning the validity of the yards regulation was first presented to the Secretary of Agriculture through the filing of a complaint by the Respondent. There was no attempt to circumvent the administrative process. It was only subsequent to the issuance of the Secretary's decision that the respondent appealed for judicial relief. Upon review of the Secretary's conclusions the Circuit Court of Appeals was requested to exercise its legitimate power by finding that the rule involved was invalid according to law. This it did. The issue presented to it was merely a question of law and as has been stated by this court on numerous occasions a reviewing judicial tribunal is always the final arbiter of pure questions of law.

Tagg Brothers and Moorhead v. *United States*, 280 U.S. 420, 74 L. Ed. 524 (1930).

Great Northern Ry. Co. v. *Merchants Elev. Co.*, 259 U.S. 285, 66 L. Ed. 943 (1922).

Under these circumstances it can by no stretch of the imagination be stated that the decision of the Circuit Court of Appeals in this controversy abrogated the doctrine of primary jurisdiction as established by this court in numerous cases.

VI.

The Circuit Court of Appeals Did Not Evade Administrative Authority by Instructing the Secretary of Agriculture to Issue a Cease and Desist Order.

It was argued on behalf of the opposition that even if the Circuit Court of Appeals was correct in determining that the exclusive patronage requirement was invalid, it erred in instructing the Secretary of Agriculture to enter a cease and desist order against the Denver Union Stock Yard Company. The contention is that the court's only authority was to reverse the Secretary's decision and remand the case for further administrative action. It would then be within the discretion of the Secretary to take the appropriate steps. That the court did not, by issuing these instructions, usurp any administrative power becomes patently clear when the situation is logically analyzed. The single issue before the Secretary concerned the validity as a matter of law of the regulation herein involved. The Secretary found that it was not invalid on its face, and the absence of evidence in the record prevented him from determining whether it would have a valid or invalid application. The complaint was then dismissed. Upon appeal, the Circuit Court of Appeals determined that the rule was invalid on its face and entered the order which is now complained of. If the rule is illegal per se, then no further administrative proceeding is necessary. The establishment of facts at a subsequent hearing could not in any way validate the exclusive patronage requirement. The court terminated any possibility of further administrative hearings by finding that the regulation was invalid on its face. The only permitted course open to the Secretary of Agriculture under these

circumstances would be to prevent the Denver Union Stock Yards from enforcing the invalid regulation. The court instructing him to accomplish this has not in any way infringed upon his discretion. He no longer has any discretion in the matter.

CONCLUSION.

On the basis of the foregoing brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, Secretary of Agriculture
of the United States,
Petitioner,

VERSUS

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY, AND NATIONAL FEEDER SERVICE CORPORATION, AMICUS CURIAE

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October, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

INDEX

	PAGE
Preliminary Statement	1
Statement of Case	3
Argument and Authorities	5
Proposition 1: The Regulation promulgated by the Denver Union Stockyard Company is unjust, unreasonable, and discriminatory and clearly violates regulatory, statutory provisions of the Packers and Stockyards Act	5
Proposition 2: The Denver Union Stockyard Company is a public utility and as such is bound to furnish its facilities upon reasonable request and without discrimination	13
Proposition 3: The Regulation is monopolistic and in restraint of trade and therefore void	16
Proposition 4: This appeal presents for decision a pure question of law	23
Conclusion	26

AUTHORITIES CITED

CASES:

Birmingham v. Rice Brothers, 2 A.L.R.2d 1108, 1117, cert. den., 332 U.S. 768, 92 L. Ed. 353 and 332 U.S. 820, 92 L. Ed. 397 ..... 10, 13, 14

Farmer's Livestock Commission Company et al. v. United States, et al., 54 F.2d 375 15

INDEX CONTINUED

PAGE

Harding Glass Co. v. Twin City Pipe Line Co., et al., 39 F.2d 408 20-21

International Salt Company v. United States, 332 U.S. 392, 92 L. Ed. 20 23

Kirt v. St. Joseph Stock Yards Company, 206 F.2d 283 12, 14

Nashville Union Stock Yard Company v. Grissom, 280 S.W. 1015 14, 18-20

People ex rel. Perceval v. Public Service Commission, 163 App. Div. 705, 707, 148 N.Y.S. 583, 585 17-18

Sioux City Stock Yards Company v. United States, 40 F. Supp. 801 10-12

United States v. O'Rourke, 116 F. Supp. 857 12-13

STATUTES:

Packers and Stockyards Act of 1921 as amended (7 U.S.C.A., Sec. 181 et seq.) 3

Title 7, U.S.C.A. 123, Sec. 210 6
Title 7, U.S.C.A. 124, Sec. 202, Subdiv. (a) 5-6
Title 7, U.S.C.A. 128, Sec. 205, 206 6-7, 25
Title 7, U.S.C.A. 136, Sec. 208, 211 7-8, 26
Title 7, U.S.C.A., Secs. 201-202 25
Title 7, U.S.C.A., Secs. 210, 211-213 23

TEXTBOOKS AND MISCELLANEOUS:

Am. Jur., Vol. 43, Sec. 22 18

Corpus Juris, Vol. 41, p. 85, Sec. 12 22
Corpus Juris, Vol. 41, p. 102, Sec. 55 22

INDEX CONTINUED. PAGE

APPENDIX

Letter of Consent to File Briefs Amicus Curiae from Thomas & Armstrong i

Letter of Consent to File Briefs Amicus Curiae from R. L. Farrington ii

Consent to Filing of Brief Amicus Curiae by Oklahoma Livestock Marketing Association, National Livestock Commission Company and National Feeder Service Corporation iii

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY, AND NATIONAL FEEDER SERVICE CORPORATION, AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed with the consent of the petitioner and the respondent, appearing in the appendix hereto, pursuant to paragraph two of rule 42 of this Court. It is filed in support of the position of the respondent, Producers Livestock Marketing Association.

The Oklahoma Live Stock Marketing Association is a nonprofit co-operative marketing association with some 27,000 members, with its principal office and place of busi-

ness at Oklahoma City in the State of Oklahoma. The National Livestock Commission Company is a wholly owned subsidiary corporation of the Oklahoma Live Stock Marketing Association, organized and existing under the laws of the State of Oklahoma, and with principal office and place of business at Oklahoma City, Oklahoma. The National Feeder Service Corporation is likewise a wholly owned subsidiary of the Oklahoma Live Stock Marketing Association, organized and existing under the laws of the State of Oklahoma, and with principal office and place of business at Oklahoma City, Oklahoma. All of said companies are engaged in the marketing of livestock through the facilities of the stock yards at Oklahoma City, Oklahoma; the National Livestock Commission Company operating strictly on a commission basis and the National Feeder Service Corporation as a trader on said market; and said companies likewise handle many transactions where cattle are bought or sold direct from producers to feeder buyers throughout the United States. It is the belief of these companies that the regulation promulgated by the Denver Union Stockyards Company and involved in this appeal is unjust, unreasonable, and discriminatory and, therefore, not authorized by law and that if it shall be permitted to stand, probably every stockyards company in the nation will follow the precedent thus established and will issue similar regulations which will result in great injury, damage and loss to the livestock industry throughout the entire nation.

We believe that the judgment of the United States Court of Appeals of the Tenth Circuit is correct and that it should be affirmed by this Court, and this brief is filed in

the hope that it may aid the Court in reaching a fair, just and correct decision of the all important and far reaching questions presented by this appeal.

STATEMENT OF CASE

This case is here on certiorari to reverse the judgment of the United States Court of Appeals of the Tenth Circuit in Case No. 5459 in that Court reversing the order of Ezra Taft Benson, Secretary of Agriculture, in a proceeding under the Packers and Stockyards Act of 1921 as amended (7 U.S.C.A., Sec. 181 *et seq.*) between Producers Livestock Marketing Association of Salt Lake City, Utah, complainant, and Denver Union Stockyard Company of Denver, Colorado, respondent; and for the sake of brevity and to avoid needless repetition, we refer to the statement of the case contained in the brief of the respondent herein, Producers Livestock Marketing Association, and adopt the same as full as though reiterated in this brief. The findings and judgment sought to be reversed here appear in the Transcript at pages 77 to 84, inclusive.

It seems to us that the primary question presented to the Court by this appeal is whether or not the regulation promulgated by the Denver Union Stockyard Company and involved herein is invalid on its face as a matter of law. The pertinent portions of the regulation here involved read as follows:

> "(c) No market agency or dealer engaging in business at this stockyard shall, upon stockyard company property, or elsewhere, nor shall any other person upon stockyard company property:

(1) Solicit any business for other markets, for sale at outside feed yards, or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this stockyard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this stockyard."

To answer the foregoing primary question we think it was necessary for the Court of Appeals: (1) To determine that the Producers Livestock Marketing Association was a marketing agency and that the Denver Union Stockyard Company was a stockyards company within the meaning of the Packers and Stockyards Act. This is admitted by the pleadings. (2) That it have before it the regulation involved. This too was contained in the pleadings. That is to say that both the status of the parties and the regulation to be construed were admitted in the pleadings. (3) It only remained for the Court to apply the Packers and Stockyards Act and other applicable provisions of the law to this admitted situation. This was purely a question of law and no further evidence was necessary. This was the view of the United States Circuit Court of Appeals and we believe that it is correct and that it should be affirmed.

ARGUMENT AND AUTHORITIES

We will discuss the legal questions which we deem decisive of the issues in this case under the following propositions:

(1) The regulation promulgated by the Denver Union Stockyard Company is unjust, unreasonable and discriminatory and clearly violates regulatory, statutory provisions of the Packers and Stockyards Act.

(2) The Denver Union Stockyard Company is a public utility and as such is bound to furnish its facilities, upon reasonable request and without discrimination.

(3) The regulation is monopolistic and in restraint of trade and therefore void.

(4) This appeal presents for decision a pure question of law.

Proposition 1.

The Regulation promulgated by the Denver Union Stockyard Company is unjust, unreasonable, and discriminatory and clearly violates regulatory, statutory provisions of the Packers and Stockyards Act.

Title 7, U.S.C.A. 124, Sec. 202, defines stockyards. Subdivision (a) of this section reads as follows:

"When used in sections 201-203 and 205-217a of this title the term 'stockyard' means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens or other inclosures and their appurtenances, in which live cattle, sheep, swine, horses, mules or goats are received, held or kept

for sale or shipment in commerce. Said sections shal not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs alleys, or passageways, is less than twenty thousand square feet."

Title 7, U.S.C.A. 123, Sec. 210, defines stockyard owner stockyard services, market agency and dealer. This section reads as follows:

"When used in this chapter—

"(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding or handling in commerce or livestock;

"(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

"(d) The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. Aug. 15, 1921, c. 64, Sec. 301, 42 Stat. 163."

It is not questioned that the Denver Union Stockyard Company owns and operates a stockyard within the statutory definition quoted above.

The pertinent portions of Title 7, U.S.C.A. 128, Sec. 205, reads as follows:

"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard."

Then follows Section 206 of the same title which deals specifically with rates and provides that the rates charged shall be just, reasonable, and nondiscriminatory, and further provides that any violation of this provision shall be unlawful. This particular section, while not involved here, is pertinent as showing the general purpose to condemn any discriminatory act on the part of stockyards operators.

Title 7, U.S.C.A. 136, Sec. 208, and the pertinent portions of Section 211 of the same title contain the following provisions:

"It shall be the duty of every stockyard owner and market agency to establish, observe and enforce, *just, reasonable, and nondiscriminatory regulations and practices* in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. Aug. 15, 1921, c. 64, Sec 307, 42 Stat. 165.

"Whenever after full hearing upon a complaint made as provided in Section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the secretary is of the opinion that any rate, charge, *regulation, or practice* of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be *just, reasonable* rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be *just, reasonable and nondiscriminatory* to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed. Aug. 15, 1921, c. 64, Sec. 310, 42 Stat. 166; Aug. 10, 1931, c. 663, 53 Stat. 1351."

We have taken the liberty of italicizing the words, "just, reasonable and nondiscriminatory regulations and practices" in Section 208 and "regulations or practices" in Section 211 as we do not think that the regulations or practices promulgated by the Denver Union Stockyard Company and here involved are either just, reasonable or nondiscriminatory within the purview and meaning of said sections.

The sections of the statute quoted *supra* stress over and over again that the regulations promulgated by stockyards companies must be *just, reasonable and nondiscriminatory*, and when we measure the regulation here under consideration by this yardstick, it is very clear on its face that it violates these provisions of the law. Suppose, for instance, that any commission company doing business on the Denver stockyards knows of a feeder over in Illinois to whom he can sell cattle from ranges in Colorado, *or elsewhere*. What

happens to him if he makes such a sale? Under this regulation his right to do business over the Denver stockyards or to use the facilities of those stockyards would be immediately terminated, while the commission company which bowed the knee and funneled all of its transactions through the Denver stockyards would pay no such penalty. If a commission firm doing business and using the facilities of the Denver Union Stockyards should ever solicit one of its clients to sell his cattle direct to a feeder in Illinois or some other state, his right to do business on those yards would be immediately terminated. Such a regulation not only affects the commission firm itself, but it is well known that the most profitable sales to the producer are those which he makes direct through a commission firm to a feeder without incurring the expense and the loss of weight necessary to funnel them through stockyards and from thence to a feeder. This regulation would practically deprive him of that outlet because no commission firm would dare to attempt to make a sale direct from him to the feeder, knowing that if its activities in that line should be discovered, its business would be wrecked and destroyed by having its right to transact business on its local yards cancelled.

Can it even be contended that a regulation so iniquitous as this is fair, or just or reasonable? We think not. And the unfortunate thing is that if the Denver Union Stockyard Company can get away with it, then every stockyard in the nation can do the same thing, and the great nation-wide market from the producer direct to the feeder will have received a body blow.

In the case of *E. H. Birmingham, App.* v. *Rice Brothers*, 2 A.L.R.2d 1108, paragraph four of the syllabus reads as follows:

> "The duties imposed by the Federal Packers and Stockyards Act upon stockyard owners and marketing agencies are substantially in accord with the common law applicable to public utilities in general."

In the body of the opinion, on page 1117, the following language will be found:

> "The conduct prohibited is always *unjust* discrimination, *unfair* rates or practices or *unreasonable* rules."

We have italicized the words "unjust, unfair and unreasonable" as they appear in the above paragraph because they are italicized in that opinion.

Is a regulation fair or just or reasonable either to the offending commission firm, or to the public, which penalizes a commission firm by depriving it of the right to transact business on a stockyards because it dares to solicit business for its customers which is not to be handled over and through those yards? And indirectly is it fair, or just or reasonable either to the producer or the feeder of livestock to thus deprive them of their God-given right to deal direct without paying tribute to any stockyards company? It was to prevent just such unreasonable regulations that the Packers and Stockyards Act was passed and that power was conferred upon the Secretary of Agriculture to regulate the practices in the stockyards of the nation. In the case of *Sioux City Stock Yards Company* v. *United States*, 40 F. Supp. 801, paragraphs one, three, four and five of the syllabus read as follows:

"1. Congress, by enacting Packers and Stockyards Act, has conferred upon Secretary of Agriculture plenary power to supervise and regulate business of a public stockyard and its market agencies, including all the material incidents and relationships of its marketing processes. Packers and Stockyards Act; Sec. 1 *et seq.* 7 U.S.C.A., Sec. 181, *et seq.*

"3. Evidence justified the Secretary of Agriculture in ordering a stockyards company to desist from enforcing its decision to exclude a commission company from acting as a market agency at the stockyards on ground that the decision was 'discriminatory.' Packers and Stockyards Act, Sec. 301, 304 as amended in 1926, 310, 7 U.S.C.A. Secs. 201, 205 and 211.

"4. The cease and desist order made by Secretary of Agriculture under Packers and Stockyards Act forbidding stockyard company from depriving commission company of continued use of its stockyard facilities was not based on erroneous view of the law by Secretary that he had jurisdiction over every controversy between stockyard owner and market agency regardless of whether it bore any relationship to the market in view of Secretary's complete findings and conclusions. Packers and Stockyards Act as amended, Secs. 301-303, 304, as amended in 1926, 305-316, 7 U.S. C.A. Secs. 201, 205-207.

"5. Secretary of Agriculture was not required to make a specific foundational finding that a market injury was being threatened or would be visited upon buying or shipping public and that a public interest was therefore involved before making a cease and desist order under Packers and Stockyards Act forbidding stockyard company from depriving commission company, as an operator or an established livestock commission business at stockyard company's stockyards, of continued use of its facilities. Packers and Stock-

yards Act as amended, Secs. 301-303, 304, as amended, 305-316, 7 U.S.C.A. secs. 201-203, 205-217."

To the same effect is the case of *Kirk* v. *St. Joseph Stock Yards Company*, 206 F.2d 283, by the United States Court of Appeals, Eighth Circuit. Paragraphs three, four and five of the syllabus of this case read as follows:

"3. Commercial stockyard is a 'public utility' subject to reasonable regulations. Packers and Stockyards Act of 1921, Sec. 310 *et seq.*, as amended, 7 U.S.C.A., Sec. 201 *et seq.*

"4. Commercial stockyard owner and operator had the duty of furnishing, upon reasonable request and without discrimination, reasonable stockyard service and of establishing, observing, and enforcing just, reasonable and nondiscriminatory regulations and practices in respect to furnishing of stockyard service. Packers and Stockyards Act of 1921, Sec. 310 *et seq.*, as amended, 7 U.S.C.A. Sec. 201 *et seq.*

"5. Commercial stockyards, as public utility, cannot escape liability for failure to furnish, without discrimination, reasonable stockyards service or for negligence in connection with such service by delegating to others duty to perform such service. Packers and Stockyards Act of 1921, Sec. 301 *et seq.*, as amended, 7 U.S.C.A. Sec. 201, *et seq.*"

In the late case of *United States* v. *O'Rourke*, 116 F. Supp. 857, in paragraph one of the syllabus it was held that the primary purpose of the Packers and Stockyards Act was to insure without discrimination reasonable stockyards services, reasonable and nondiscriminatory rates, and to eliminate unjust and discriminatory practices. This paragraph reads as follows:

"Purpose of Packers and Stockyards Act is to insure, without discrimination, reasonable stockyards and services, reasonable and nondiscriminatory rates, and the elimination of unjust or discriminatory practices. Packers and Stockholders Act of 1921, 1 *et seq.*, as amended, 7 U.S.C.A. 181 *et seq.*"

In the case of *Birmingham* v. *Rice Brothers*, cited and quoted *supra*, certiorari was denied by this Court. See 332 U.S. 768, 92 L. Ed. 353 and 332 U.S. 820, 92 L. Ed. 397.

Both the statutory provisions quoted *supra* and the above decisions construing the same lay special emphasis upon the proposition that all regulations and practices of a stockyards company, if they are to be permitted and given effect, must be fair, and reasonable, and nondiscriminatory; and we respectfully submit that the regulation here involved is neither fair, nor reasonable nor nondiscriminatory. On the contrary, it is unjust, unreasonable and discriminatory, and if established as a general practice throughout the stockyards of the nation, as it will be if the regulation of the Denver Union Stockyard Company here involved shall be upheld, it will prove injurious not only to the commission firms and other marketing organizations which must use the facilities of those yards, but it would strike a body blow to the stocker and feeder business of the entire nation.

Proposition 2.

The Denver Union Stockyard Company is a public utility and as such is bound to furnish its facilities upon reasonable request and without discrimination.

We think that the proposition that a stockyards company is a public utility and that as such it is subject to reasonable regulations under the Packers and Stockyards Act

and that it must furnish its facilities upon reasonable request and without discrimination, can no longer be questioned. Paragraph 3 of the syllabus of the case of *Kirk v. St. Joseph Stock Yard Company*, 206 P.2d 283, specifically so holds. This paragraph reads as follows:

> "Commercial stockyard as a 'public utility' subject to reasonable regulations. Packers and Stockyards Act of 1921, 301 *et seq.*, as amended, 7 U.S.C.A., 201 *et seq.*"

In the case of *Nashville Union Stock Yard Company v. Grissom*, 280 S.W. 1015, it was specifically held that this section required stockyard companies to furnish services to all dealing in livestock on its premises, on reasonable request and without discrimination.

In the case of *Birmingham v. Rice Brothers*, 2 A.L.R. 2d 1108, *certiorari denied*, 92 L. Ed. 95, it was specifically held that the conduct prohibited to a public utility includes ways *unjust* discrimination, *unfair* rates or practices, and *unreasonable* rules. The law on this point is so thoroughly settled that no purpose will be served by the citation of further authority. This being true it only remains to measure by this yardstick the regulation promulgated by the Denver Union Stockyard Company. Is it just, reasonable and nondiscriminatory? We do not think that it is either just, reasonable, or nondiscriminatory.

For instance, it would apply one rule to the firm which transacts all of its business on the Denver yards and funnels all of its livestock through those yards, while it would apply an entirely different rule to the firm which was licensed to do business on those yards but which bought cattle in the country for its customers and shipped them di-

rect to a feeder or to some other market without funneling them through the Denver yards and paying tribute to the Denver Union Stockyard Company.

The very purpose and the only purpose of such a regulation is to force all livestock to move through those yards thereby establishing a monopoly over the handling of livestock in that area and collecting tribute on every animal.

The firm which does no country business and whose only business is conducted on the Denver yards would not be hurt by the regulation, while the firm whose business consists largely of buying in the country and shipping direct to the feeder trade could easily be ruined by it. Such a firm would be deprived of its right to do business on the Denver yards if it dared to serve its customers and to save them money by disobeying this unjust, unfair, unreasonable and discriminatory regulation by shipping direct to the buyer. If a regulation which operates in this manner is either fair, reasonable or nondiscriminatory, then we can hardly conceive of one which would be discriminatory. In the case of *Farmer's Livestock Commission Company et al. v. United States, et al.*, 54 F.2d 375, paragraph 2 of the syllabus reads as follows:

> "Individual refusal of person furnishing stockyards services to deal with co-operative producers' and buyers' organizations constitutes violation of statute prohibiting discriminatory practices. (Packers and Stockyards Act, 307, 7 U.S.C.A. 208.)"

What is the difference in principle between a regulation which would deprive a company of the right to do business on a stockyards because it was a co-operative, and one which would deprive a company of the right to do

business because it made some shipments direct to its customers without funneling them through the stockyards, while permitting other companies to transact business who did route their shipments through the yards? We respectfully submit that there is no distinction.

Proposition 3.

The Regulation is monopolistic and in restraint of trade and therefore void.

We think it only necessary to quote again the pertinent portions of the regulation under consideration to show that its sole and only purpose is to monopolize business by compelling all firms or individuals who are engaged in doing business on the yards of the Denver Union Stockyard Company to funnel all their shipments through its yards as a condition precedent to being permitted to transact business thereon. We quote again the particular portions of the regulation which disclose this purpose:

> "(c) No market agency or dealer engaging in business at this stockyard shall, upon stockyard company property, or elsewhere, nor shall any other person upon stockyard company property—
>
> (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this stockyards."

To illustrate the actual effect of this regulation a firm licensed to use the facilities of the Denver Union Stockyards

would forfeit the right to do business on those yards if it bought cattle in the country for a customer in the corn belt and shipped them to him direct. To preserve its right to do business it would be obliged to route them in a roundabout way through the Denver yards and pay tribute on them and then forward them to its customer.

This unreasonable regulation would in fact preclude a trader doing business on the Denver yards from either buying or selling any cattle in a great part of the State of Colorado where the transactions would divert the cattle from the Denver Union Stockyards, and this is true whether or not the owner of the cattle would have sent them through those yards even if the deal had not been made.

It is only necessary to point out the effect of the enforcement of this regulation in order to see that it would interfere with the free movement of livestock in commerce, and that it is both monopolistic and in restraint of trade.

In *People ex rel. Perceval v. Public Service Commission*, 163 App. Div. 705, 707, 148 N.Y.S. 583, 585, a public utility company supplying electric current required of those who sought to become its customers an agreement that they should take no electric current from any other company. In awarding a writ compelling the company to supply the needs of an applicant for service, although he also proposed to take electric current at the same place from another company, the Court said:

> "It is, of course, the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the

> requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electric current."

What is the difference between a regulation which would require a customer to take all of his electricity from one company or to receive none at all, and a regulation which would require a customer of the Denver Union Stockyard Company to funnel all of his livestock through the yards of that company or forfeit his right to do any business on its yards whatever?

American Jurisprudence, Vol. 43, Section 22, contains the following language:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders."

A case very directly in point here is that of *Nashville Union Stock Yards, Inc.* v. *Grissom*, by the Supreme Court of Tennessee, 230 S.W. 1015. In this case the stockyards company contended that it had a right to establish its own rules in regard to what individuals or companies might transact business on its yards and to write down its own rules and regulations as to the terms and conditions under which they could do so. We take the following extracts from the body of the opinion in this case:

> "It is conceded that complainant is subject to and is governed by the provisions of the Packers and Stockyards Act passed by Congress in 1921 (Comp. St. Ann.

Supp. 1923, 8716¼-8716¼z; Fed Stat. Ann. 1921. Supp. pp. 287-301).

"The validity of this act was upheld in *Stafford* v. *Wallace*, 42 S. Ct. 397, 285 U.S. 513, 66 L. Ed. 735, 23 A.L.R. 229. It regulates the business of packers done in interstate commerce, and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business of handling, receiving, buying and selling live stock in commerce. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders * * *.

"(1) As before stated, defendant's answer emphatically and positively denies these general allegations. Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying, and selling livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which required J. D. Bolling & Co. or their agent, the defendant, to do all of their business with complainant; and no such contract is alleged in the bill.

"(2) By section 301a of the act complainant is defined as a stockyard owner. By Section 304 of said act it is made the duty of complainant to furnish to those engaged in shipping, buying, selling and handling live stock on its premises upon reasonable request, without discrimination, reasonable stockyard services. This is a duty which the act imposes upon comp' nant, which it is bound to perform and this is tr s to all shippers, buyers, sellers and handlers of live stock

on and through its premises. To this extent it is a public corporation, and these duties cannot be disregarded."

In the case of *Harding Glass Co. v. Twin City Pipe Line Co., et al.*, 39 F.2d 408, paragraph 7 of the syllabus reads as follows:

"Contract requiring glass company to buy gas exclusively from pipe line company as long as it could supply glass company's needs *held* invalid as stifling competition. (Const. Ark. art. 2, 19.)"

Quoting from the body of the opinion in the above case we take the following very pertinent language:

"Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful. Greenhood on Public Policy, p. 180.

"Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U.S. 396, 9 S. Ct. 553, 32 L. Ed. 980; *West Va. T. Co.* v. *Ohio R.P.L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Gwynn* v. *Telephone Co.*, 69 S.C. 434, 48 S.E. 460, 67 L.R.A. 111, 104 Am. St. Rep. 819; *(Central Ohio) Salt Co.* v. *Guthrie*, 35 Ohio St. 672. As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced.

"Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character *(Gibbs* v. *Cons. Gas Co., supra)*, and from a reading of the contract it is apparent that its purpose

in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and, in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare, admits of no controversy.

"In *People ex rel. Perceval* v. *Public Service Commission* 163 App. Div. 705, 707, 148 N.Y.S. 583, 585, a public utility company supplying electric current required of those who sought to become its customers an agreement that they should take no electric current from any other company. In awarding a writ compelling the company to supply the needs of an applicant for service, although he also proposed to take electric current at the same place from another company, the court said:

> "It is, of course, the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electric current."

Again we ask, what is the difference in principle between a contract requiring a consumer to buy all of its gas exclusively from a pipeline company and a regulation which requires a commission firm transacting business on

the Denver Union Stockyards to route all of its shipments of livestock through those yards? We submit that from a legal point they are identical, and if the one is monopolistic and in restraint of trade, the other is likewise.

Corpus Juris, Vol. 41, page 85, Sec. 12, in discussing the legal condemnation of monopolies, uses the following language:

> "Monopolies have always been considered odious at common law, inimical to the public welfare, and against public policy. And this is so whether created by governmental grant or by the acts of private parties, persons, or corporations, since the effect on industrial liberty and the price of commodities will be the same irrespective of the method by which the monopoly is created."

The same authority at page 102, Section 55, discussing the purposes of the Sherman Anti-Trust Act uses the following language:

> "The statute was enacted for the purpose of protecting trade and commerce among the several states and the foreign nations from unlawful restraints and monopolies; to prevent undue interference with the free exercise of their rights by those engaged or who wish to engage in trade and commerce—to preserve the right of freedom of trade; to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress competition."

We respectfully submit that the regulation involved in this case comes within the acts condemned by both the common law and by the anti-trust act and in the case of

International Salt Company v. United States, 332 U.S. 392, 92 L. Ed. 20, the Supreme Court of the United States has held that, "Every contract, combination or arrangement of which the direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes."

Proposition 4.

This appeal presents for decision a pure question of law.

The order appealed from appears in the TRANSCRIPT OF RECORD at pages 77 to 84, inclusive, and when read it discloses that it is based wholly upon the legal conclusion that the regulation is invalid on its face as a matter of law. We believe this conclusion to be correct.

It is argued in the amicus curiae brief filed on behalf of the American Stockyards Association that Sections 210 and 211-213 of Title 7, U.S.C.A., require a full hearing by the Secretary of Agriculture on a complaint in regard to a regulation such as that here under consideration and that this would require the taking of evidence, but we respectfully submit that this contention is not well taken.

If the Secretary were acting on his own initiative and there were no admissions in the record, the argument would seem more plausible, but such is not the case. Here it is admitted in the pleadings that the Denver Union Stockyards Company is a stockyard owner rendering stockyard services within the meaning of the Packers and Stockyards Act; that the Producers Livestock Marketing Association is a marketing agency as defined in said act and that it is

doing business on the stockyards of said Denver Union Stockyard Company. These things being admitted, they require no proof.

The regulation complained of was also part of the pleadings; its contents were admitted; it is plain and unequivocal in its terms and requires no evidence to explain it.

The Secretary of Agriculture had before him in the record everything that was essential to enable him to determine the question before him and the introduction of evidence was not necessary to enable him to do so. The same thing was true of the United States Court of Appeals. That the Court so considered is clearly shown by the following extracts from its opinion:

> "It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a 'full hearing' with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(c) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.
>
> "Although 9 C.F.R. 202.2(g) defines 'hearing' to be 'that part of the proceeding which involves the submission of evidence', it is fundamental to the law that the submission (fol. 87) of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act

the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint to justice and law, of the step asked to be taken. *Akron, C. & Y. Ry. Co.* v. *United States*, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a 'full hearing' for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence."

In the face of the admissions pointed out *supra*, there can be no question but that the Denver Union Stockyard Company is a "stockyard owner" within the provisions of the Packers and Stockyard Act, quoted *supra*, nor can there be any question that the Producers Livestock Marketing Association is a "marketing agency" or "dealer" operating on said yards within the purview of said act. (7 U.S.C.A., Secs. 201-202.) Likewise, there can be no argument about the provisions of the regulation. They too are admitted and speak for themselves.

As a stockyards owner, the Denver Union Stockyard Company must comply with the portion of 7 U.S.C.A., Sec. 205, which reads as follows:

"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyards."

It must likewise comply with the provisions of Section 208, which read as follows:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful. Aug. 15, 1921, 307, 42 Stat. 165."

The question presented is whether the regulation here involved and quoted *supra* in this brief, on its face, violates the provisions of the Packers and Stockyards Act, aforesaid, and the other applicable legal requirements and restraints discussed herein and in the brief of the respondent to which reference is here made.

We believe that on its face the regulation is (a) unjust, (b) unreasonable, and (c) discriminatory; that it is in restraint of trade and tends to create a monopoly, and that the holding of the United States Circuit Court of Appeals should be affirmed.

CONCLUSION

We think that it goes without saying that if this regulation shall be permitted to stand, similar regulations will be adopted by every stockyards company in the nation, and this would affect the entire livestock industry of the nation because it would affect the free movement of livestock through normal channels by funneling them through livestock yards to the profit of those yards and to the detriment of the public as a whole and particularly to the detriment of producers and feeders. It is for this reason that

we have requested and obtained permission to file this brief. We believe that the judgment of the United States Court of Appeals of the Tenth Circuit correctly holds the regulation of the Denver Union Stockyard Company involved herein to be unjust, unreasonable, discriminatory, monopolistic and in restraint of trade, and that it should be affirmed.

Respectfully submitted,

WILLIAM G. DAVISSON,
306-307 Little Building,
Ardmore, Oklahoma,

Attorney for Oklahoma Livestock Marketing Association, National Livestock Commission Company, and National Feeder Service Corporation.

October, 1957.

APPENDIX

October 4, 1957

Mr. William G. Davisson
Attorney at Law
Little Building
Ardmore, Oklahoma

Dear Mr. Davisson:

Re: Ezra Taft Benson, Secretary of Agriculture of the United States vs. Producers Livestock Marketing Association—Supreme Court of the United States —No. 118—October Term, 1957 (Formerly No. 981—October Term, 1956)

In response to your letter of September 25, Respondent, Producers Livestock Marketing Association, hereby consents to the filing of briefs amicus curiae by you in the above case on behalf of your clients, Oklahoma Livestock Marketing Association, National Livestock Commission Company and National Feeder Service Corporation

Yours very truly,

THOMAS AND ARMSTRONG
BY H. P. Thomas

HPT:BC

APPENDIX I

UNITED STATES DEPARTMENT OF AGRICULTURE

Office of the General Counsel

Washington 25, D.C.

July 25, 1957

AIR MAIL

William G. Davisson, Esq.
Little Building
Ardmore, Oklahoma

Dear Mr. Davisson:

This is in reply to your letter of July 22, requesting us, as the attorneys for the Secretary of Agriculture, to consent to the filing of a brief *amicus curiae* in the Supreme Court by the Oklahoma Livestock Marketing Association, the National Livestock Commission Company, and the National Feeder Service Corporation, in the case of *Benson* v. *Producers Livestock Marketing Association*, No. 981, October Term, 1956.

We believe that under the circumstances we should consent to the filing of a brief *amicus curiae* by the Oklahoma Livestock Marketing Association, the National Livestock Commission Company and the National Feeder Service Corporation and accordingly we have executed the form of consent attached to your letter of July 22. In accordance with your request, we are returning to you the executed consent as an attachment to this letter.

With best wishes,

Sincerely yours,

R. L. Farrington
General Counsel

Attachment

[APPENDIX]

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1956.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner, v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION, Respondent	No. 981
THE DENVER UNION STOCK YARD COMPANY, Petitioner, v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION, Respondent	No. 917

CONSENT TO FILING OF BRIEF AMICUS CURIAE BY OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY AND NATIONAL FEEDER SERVICE CORPORATION.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner, in Cause No. 981 above hereby consents that OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY AND NATIONAL FEEDER SERVICE CORPORATION may file a brief *amicus curiae* herein.

NEIL BROOKS

Attorney for Said Petitioner, Ezra Taft Benson, Secretary of Agriculture of the United States.

Dated, July 22, 1957

IN THE

Supreme Court of the United States

Office - Supreme Court, U.S.
NOV
JOHN T. ... Clerk

OCTOBER TERM, 1957.

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For The American Farm Bureau Federation, Amicus Curiae.

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INDEX.

Table of Contents

	PAGE
Preliminary Statement	1
Statement of Interest	2
Statement of the Case	3
Argument	5
I. The Challenged Regulation is Contrary to the Objectives of the Packers and Stockyards Act and is, therefore, Prohibited and Declared by Congress to be Unlawful	5
II. The Challenged Regulation Violates Basic Principles of Law Governing Public Utilities	10
III. The Challenged Regulation would Prevent the Respondent from Fulfilling its Statutory Duty to Furnish Reasonable Stockyard Services	12
IV. The Challenged Regulation Violates Anti-Trust Laws	13
Conclusion	15

Table of Cases

Birmingham v. Rice Bros., 238 Iowa 410, Cert. Den. 68 S. Ct. 151	11
Bowles v. Albert Glauser, Inc., 61 F. Supp. 428 (D.C.-Mo., 1945)	8
Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 205 N.W. 630	11
DeVries v. Sig Ellingson & Company, 100 F. Supp. 781 (1951)	10

Farmers' Livestock Commission Co. v. U.S. (D.C. ED. Ill.) 54 F. (2d) 375 11
Houfburg v. Kansas City Stockyard Co. of Maine, Mo., 283 S.W. (2d) 539 (1955) 9
International Salt Co. v. U.S., 332 U.S. 392 14
Kirk v. St. Joseph Stockyards Co., 206 F. (2d) 283 (1953) 10
Midwest Farmers v. U.S. 64 F. Supp. 91 (1945) 10
Nashville Union Stockyards v. Grissim, 153 Tenn. 225, 280 S.W. 1015 11
People v. Public Service Commission, 148 N.Y.S. 583 (1914) 11
Re: Union Electric Light and Power Co., P.U.R. 1932-B, p. 1 11
Seaton Mountain Electric L.H. & P. Co. v. Idaho Spring Inv. Co., 49 Colo. 122, 111 P. 834 (1910) 11
Stafford v. Wallace, 258 U.S. 495 ..... 7, 10
State v. Citizen's Tele. Co., 61 S.C. 83, 39 S.E. 257 (1901) 11
Strabie v. Bucks County Electric Co., P.U.R. 1920-D, p. 290 11
United States v. Donahue Bros., 59 F. (2d) 1019 (C.A. 8, 1932) 7
United States v. O'Rourke, 116 F. Supp. 857 (1953) .. 8

Statutes

Packers and Stockyards Act, 7 U.S.C. Section 181, et seq.
Section 181 3
Section 201 5
Section 205 ..... 11, 12
Section 208 15
Sherman Anti-Trust Act, Section 2 13

Miscellaneous

F.C.S. Bulletin 1, U.S. Dept. of Agriculture, Dec. 1955 ..... 6, 12
36 Am. Jur. Monopolies, etc., Sec. 6 14
61 Cong. Rec. 2704-6, 4781-2 2
Gerald Engleman, The American Livestock Auction, U. S. Dept. of Agriculture, 1956, p. 3 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For The American Farm Bureau Federation, Amicus Curiae.

Preliminary Statement.

This Brief is filed with the written consent of the parties hereto, pursuant to Rule 42 of this Court. This Brief is in support of the position of the Respondent, the Producers Livestock Marketing Association, and of the decision of the United States Court of Appeals for the Tenth District, reported in 241 F. (2d) 192.

Statement of Interest.

The American Farm Bureau Federation (hereinafter called "Federation") is a non-profit corporation organized in 1919 for the purpose of promoting, protecting, and representing the business, economic, social, and educational interests of the farmers of the nation and aiding in the development of agriculture throughout the United States. The Federation is an independent, non-governmental, voluntary organization with a membership of approximately 1,600,000 farm and ranch families in the 48 states and Puerto Rico. The largest percentage of its membership is comprised of livestock producers and feeders.

In its early history the Federation actively sponsored the organization of numerous cooperative livestock marketing associations. These associations joined together in 1930 into the National Livestock Producers Association. (F.C.S. Bulletin 1, U. S. Department of Agriculture, Dec., 1955, p. 85).

The Federation played an active part in developing and sponsoring the packers and stockyards legislation. (61 Cong. Rec. 2704, 2705, 2706, 4781, 4782). The Federation is greatly concerned that unless the issue involved in this proceeding is resolved in favor of the Respondent, the Packers and Stockyards Act may be used as a means of fostering monopolies and restraining commerce, which would be directly contrary to the original intent of Congress.

As the instant controversy involves the validity of a regulation affecting a large segment of its membership, the Federation's interest herein is obviously direct and vital.

Statement of the Case.

The matter under consideration by this Court involves a judicial review by the United States Court of Appeals for the Tenth Circuit of a decision and order made by the Secretary of Agriculture under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*). In said order (R. 33; 15 Agr. Dec. 638) the Judicial Officer in the United States Department of Agriculture dismissed a Complaint filed by the Respondent, the Producers Livestock Marketing Association. This Complaint challenged the validity of a regulation (Item 10(c) of Tariff No. 14) issued by the Denver Union Stock Yard Company on May 11, 1955 under purported authority of the Packers and Stockyards Act.

This challenged Regulation 10(c) reads, in part, as follows:

> "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, **or elsewhere**, nor shall any other person upon Stock Yard Company property (Emphasis added)
>
> (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or
>
> (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." (R. 12)

The Respondent is a cooperative marketing association of livestock producers, registered with the Secretary of

Agriculture under the Act as a market agency to buy and sell livestock on a commission basis at the Denver Stock Yard and at other posted stockyards (R. 11).

In its opinion the Court of Appeals concluded that "• • • Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act." (R. 83-84).

Thereupon, the Court of Appeals entered a Judgment on February 15, 1957 in which it ordered and adjudged "• • • that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)." (R. 84).

A more complete statement of the case and the legal questions presented for review are set forth in the briefs of the principal parties hereto. Therefore, there is no reason to go into any further details in this amicus curiae brief.

ARGUMENT.

I.

The challenged regulation is contrary to the objectives of the Packers and Stockyards Act and is, therefore, prohibited and declared by Congress to be unlawful.

Section 307 of the Packers and Stockyards Act provides as follows:

> "It shall be the duty of every stockyard owner and market agency (1) to establish, observe and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." (7 U.S.C. Sec. 208)

Under the challenged regulation market agencies engaged in business on the Denver Market are given two alternatives: (1) do business exclusively in or through the Denver Stockyard or (2) forego the opportunities of the Denver Market and try to do business "elsewhere."

The Federation is greatly concerned about the adverse effect that regulations of this nature will have upon cooperative livestock marketing associations throughout the United States. Most of these producer-owned and controlled marketing agencies, which were organized for the purpose of securing improved marketing services for farmers and

(1) Sec. 301 (c) of the Act defines the term "market agency" to mean " * * * any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." (7 U.S.C. 201).

reducing their marketing costs, originally operated at terminal markets. In the 1920's it was customary for livestock to be assembled at country points and shipped by rail to terminal markets where it was received on consignment by commission agencies and sold to packers, feeders and dealers. However, the increased use of trucks and the decentralization of packing plant operations brought many changes in livestock marketing methods. More and more livestock began to move through auctions, ([2]) small markets, concentration points and direct from the producer to the packer, thereby causing a reduced volume at the larger terminal markets. To meet these changing conditions and to maintain or expand volume, many cooperatives set up machinery to service their members at country points, such as through establishing local concentration yards or by setting up branch sales agencies at smaller terminal markets to serve a limited trucking territory. In many areas farmers organized local auction markets. In 1953 there were 38 producer-owned marketing agencies in the United States, handling 16,638,000 head of livestock, with a value of $1,030,770,000. These 38 farmer-owned marketing agencies were operating in 131 markets, including both terminal and country points. *However, only 29 of these were terminal markets.* (F.C.S. Bulletin 1, U. S. Department of Agriculture, Dec. 1955, pp. 85-86).

It should be obvious that the challenged regulation, if enforced, will make it impossible for a market agency—farmer owned or otherwise—operating on the Denver

([2]) Auction livestock markets now total around 2,400. (Gerald Engleman, The American Livestock Auction Market, U. S. Department of Agriculture, 1956, p. 3)

Market to operate elsewhere. In order to continue to serve its members on the Denver Market, the Respondent must abandon all of its country business. As a result, farmer members of this marketing association would have their opportunity for marketing their livestock drastically reduced, their investment in their cooperative depreciated, and their bargaining power greatly curtailed.

(a)

This Court has consistently recognized that one of the objectives of the Act is to promote free and open competition, thus assuring livestock producers a fair price.

In the case of *Stafford* v. *Wallace*, 258 U.S. 495 at 514, this Court held that, "The object to be secured by the Act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the "great stockyards and slaughtering centers on the borders of that region * * * " On page 516 this Court further stated that "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character."

Consider also the following interpretations of the Act:

United States v. *Donahue Bros.*, 59 F. (2d) 1019 (C.A. 8, 1932).

"One of the purposes of this Act was to protect the owner and shipper of livestock and to free him from the fear that the channel through which his

product passed, through discrimination, exploitation, over-reaching manipulation or other unfair practices might not return to him a fair return for his product."

Bowles v. *Albert Glauser, Inc.*, 61 F. Supp. 428 (DC.—Mo., 1945):

"It is the declared public policy of the government to maintain public stockyards * * * Government supervision of public stockyards has for one of its prime purposes the maintenance of open and free competition of buyers aided by the sellers' representatives. Such a system results in the payment of the highest market price for the producers' product that such arrangement can effect not exceeding, however, the maximum price set by government order."

Certainly, when one of the objectives of the Act is to foster competition and a free open market, it is inconceivable that Congress intended for the Act to be used as a means of curtailing legitimate marketing activities of both the producer and those through whom he deals.

(b)

A related but separate objective is to eliminate discriminatory and unfair practices.

In describing the policy of the Packers and Stockyards Act, the following language has been used:

United States v. *O'Rourke*, 116 F. Supp. 857 (1953):

"The purpose of this Act is to insure without discrimination reasonable stockyards' service * * * reasonable and non-discriminatory rates * * * and the elimination of unjust or discriminatory practices."

Houfburg v. *Kansas City Stockyard Company of Maine*, *Mo.*, 283 S.W. (2d) 539 (1955):

"The Packers and Stockyards Act was enacted to remedy abuses that have grown up in the large stockyards of the country in that packers, stockyards, owners, commissionmen and dealers were engaged in unfair, monopolistic and discriminatory practices."

What could be greater discrimination than that found in the regulation under scrutiny? The denial of the use of facilities or services simply because it is not to an individual's advantage to utilize them exclusively is discrimination running rampant. Those dealers, or marketing agencies transacting all their business through the stockyard's facilities would have the advantages thereof to the absolute exclusion of those who preferred to maintain some outside connections. This exclusion by the terms of the regulation has no exceptions and is applicable whether the result is beneficial or detrimental to the public, the producers, marketing agencies, or the stockyard itself. As discrimination is one of the evils sought to be cured by the Packers and Stockyards Act, and since the exclusive patronage requirement is in direct conflict with this aim, it is unlawful and should be expunged from the yards tariff.

(c)

The challenged regulation will also tend to create a monopoly in livestock marketing, another evil which the Packers and Stockyards Act was designed to eradicate.

If an individual cannot utilize a stockyard's facilities and still maintain business connections with other marketing points in the area, the weaker markets will disappear, with the stronger remaining. Thus, there is a trend toward

monopoly and a restraint of trade in violation of the statute's policy. This policy has been restated by the court on various occasions, the following quotation merely being illustrative of the accepted concept:

DeVries v. *Sig Ellingson & Company*, 100 F. Supp. 781 (1951):

> "The Packers and Stockyards Act was passed for the purpose of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; furthermore, to control prices, *to prevent monopoly* and to eliminate unfair discriminatory and deceptive practices in the meat industry; * * *." (Italics added)

The three main objectives of the Packers and Stockyards Act, (1) to maintain a free and competitive livestock market, (2) to eliminate discriminatory practices, and (3) to prevent monopolies and restraint of trade, are violated by the challenged regulation. This being the case, there can be no justification for its continued existence, and it should be declared invalid as a matter of law.

II.

The challenged regulation violates basic principles of law governing public utilities.

This Court has held that the Packers and Stockyards Act " * * * treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranches and farms of the West to consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulations." *Stafford* v. *Wallace*, 258 U. S. 495 at 516. Also, *Kirk* v. *St. Joseph Stockyards Co.*, 206 F. (2d) 283 (1953); *Midwest Farmers* v. *U. S.*,

64 F. Supp. 91 (1945). *Birmingham* v. *Rice Bros.*, 238 Iowa 410, Cert. Den. 68 S. Ct. 151.

The statutory authority for treating stockyards as a public utility is found in Sec. 304, which reads as follows: "It shall be the duty of every stockyards owner and market agency to furnish upon request without discrimination reasonable stockyards' services * * *." (7 U.S.C. 205)

The controverted regulation conditions the furnishing of services in the Denver stockyards on exclusive patronage by those marketing agencies and dealers desiring to avail themselves of the yard's services. This condition precedent, while permissible in the realm of private business, becomes invalid where its utilization is attempted by an activity affected with a public interest. This results from the fact that a service or facility dedicated to the public must be furnished without discrimination, and to accord it solely to those not patronizing other similar services or facilities is discrimination. *State* v. *Citizen's Tele. Co.*, 61 S. C. 83, 39 S. E. 257 (1901); *People* v. *Public Service Commission*, 148 N.Y.S. 583 (1914); *Re Union Electric Light and Power Co.*, P. U. R. 1932 B, page 1; *Strahie* v. *Bucks County Electric Co.*, P. U. R. 1920-D, p. 290; *Seaton Mountain Electric L. H. & P. Co.* v. *Idaho Spring Inv. Co.*, 49 Colo. 122, 111 P. 834 (1910).

The Court of Appeals correctly held that "Any properly exclusionary regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by considerations of the parties which might form a valid basis of private contract." (R. 82) *Carnes* v. *St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N.W. 630; *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015; *Farmers' Livestock Commission Co.* v. *U. S.* (D.C.E.D. Ill.) 54 F. 2d 375.

III.

The challenged regulation would prevent the Respondent from fulfilling its statutory duty to furnish reasonable stockyard services.

Among other things, Regulation 10(c) denies the services of the Denver Stock Yard if a marketing agency should even "endeavor to secure customers to sell or purchase livestock elsewhere" than at the Denver Stock Yard. This is in direct conflict with Sec. 304 of the Act which provides that "It shall be the duty of every * * * market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * * ." (7 U.S.C. 205)

According to the record, the Respondent is a cooperative marketing association registered with the Secretary of Agriculture under the Act as a market agency to buy and sell livestock on a commission basis at the Denver Stock Yard and at other posted stockyards. (R. 11). Also see F.C.S. Bulletin 1, U. S. Department of Agriculture, December 1955, page 89, for a listing of Respondent's branch offices, *one of these being Los Angeles.*

In its amicus curiae brief the American Stock Yards Association states that there are numerous markets which have regulations similar or identical to the challenged regulation. On pages 15-A and 16-A of the appendix attached to its brief one will find Tariff No. 16, effective February 10, 1957, of the Los Angeles Union Stock Yard Company which contains a Regulation 10(c) identical to the challenged regulation.

By rendering a reasonable service for a member-producer on the Denver Stock Yard, the Respondent is prohibited from rendering a reasonable service for the same

or a different member-producer on the Los Angeles stockyard. It is obvious, as pointed out by the Court of Appeals, that in such a situation the marketing agency "cannot perform its statutory duty in one regard or another." The compulsion of the challenged regulation is therefore in conflict with the requirement of Section 304 which imposes a duty upon marketing agencies to render reasonable services for its customers.

IV.

The challenged regulation violates anti-trust laws.

In addition to violating certain statutory provisions of the Packers and Stockyards Act and recognized principles governing public utilities, the challenged regulation is also in conflict with basic anti-trust laws.

Section 2 of the Sherman Anti-Trust Act is applicable to the situation under consideration. It reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * * " (15 U.S.C. Sec. 2).

Any arrangement which tends to *stifle* legitimate competition is unlawful at common law as well as under anti-trust statutes.

> "Stifling or Suppressing of Competition—Every contract, combination, or arrangement of which the direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes. To be within the rule, it is not essential that the combination shall have been successful in suppressing competition; if the

tendency of the arrangement has been to lessen competition in some degree, the conclusion is that it is unlawful." 36 Am. Jur. Monopolies, etc., Sec. 6.

This Court recognized this principle in the case of *International Salt Co.* v. *U.S.*, 332 U.S. 392, 396:

> "Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."

The American Stock Yards Association in its amicus curiae brief quite frankly admits that the terminal markets are facing an economic problem arising from the diversion of livestock from the markets of its members and that Regulation 10(c) is the answer to the problem. The brief of that Association points out on page 22 that "Regulation 10(c) of the Denver Union Stock Yard Company is not unique but fits into the developing pattern of regulating various aspects of the problem." On page 4 of its brief the Association stated that the challenged regulation "is part of a long-standing pattern throughout the stockyard industry."

The Judicial Officer in the United States Department of Agriculture in his opinion stated that "We are not by this decision saying that Item 10(c) of Respondent's regulations is valid under the Federal anti-trust laws. We merely hold that the record is insufficient for a determination that Item 10(c) violates such laws." (R. 32)

We respectfully submit that this is a question of law—not of fact; that the purpose of the challenged regulation is clear on its face; that the record is adequate to establish the objectives of the Denver Union Stock Yard Company and the other stockyard companies affiliated with the American Stock Yards Association; that the challenged regulation is in direct violation of the anti-trust laws of this country; and that therefore the challenged regulation should be declared to be unlawful.

Conclusion.

It is respectfully submitted that the challenged regulation is unlawful as violative of the Packers and Stockyards Act, the general concept of nondiscrimination present in the public utility field, and the anti-trust laws in general. As its invalidity is apparent on its face, no further hearings are necessary to determine its legality. For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 15, 1957.